TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1927

No. 231

FANNIE E. UNTERMYER, AS EXECUTRIX, AND EDWARD D. UNTERMYER, AS EXECUTOR, OF THE LAST WILL AND TESTAMENT OF ISAAC UNTERMYER, DECEASED, PETITIONERS,

vs.

CHARLES W. ANDERSON, AS COLLECTOR OF INTERNAL REVENUE OF THE UNITED STATES OF AMERICA FOR THE THIRD DISTRICT OF NEW YORK

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 15, 1927

CERTIORARI GRANTED MAY 2, 1927

(32,623)

(32,623)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927

No. 221

FANNIE E. UNTERMYER, AS EXECUTRIX, AND EDWARD D. UNTERMYER, AS EXECUTOR, OF THE LAST WILL AND TESTAMENT OF ISAAC UNTERMYER, DECEASED, PETITIONERS,

vs.

CHARLES W. ANDERSON, AS COLLECTOR OF INTERNAL REVENUE OF THE UNITED STATES OF AMERICA FOR THE THIRD DISTRICT OF NEW YORK

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MAY 6, 1927

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IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

L. 36-251

WRIT OF ERROR

UNITED STATES OF AMERICA, ss:

The President of the United States of America to the Judges of the United States District Court for the Southern District of New York, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, or some of you, between Fannie E. Untermyer as Executrix and Edward D. Untermyer as Executor under the Last Will and Testament of Isaac Untermyer, deceased, as plaintiffs and Charles W. Anderson as Collector of Internal Revenue of the United States of America for the Third District of New York, as defendant manifest error has happened to the great damage of the plaintiffs-in-error, as stated and appears by the judgment entered herein on the 22nd day of March, 1927, which dismissed the complaint of the plaintiffs with $30.00 costs in favor of the defendant and against the plaintiffs,

We, being willing that such errors, if any hath been made, should be duly corrected and full and speedy justice be done to the parties aforesaid in this behalf,

Do hereby command you that, under your seal, distinctly and openly, you send the record and proceedings aforesaid with all things concerning the same to the Judges of the United States Circuit Court of Appeals for the Second Circuit at the Court Rooms of said Court in the Post Office [fol. 2] Building in the City of New York, together with this writ so that you may have the same at said place, before the Judges aforesaid on the 4th day of April, 1927, that the record and proceedings aforesaid being inspected, the said Judges of the United States Circuit Court of Appeals for the Second Circuit may cause further to be done therein, to correct these errors, what of right and according

to law and custom of the United States ought to be done in the premises.

Witness, Honorable William H. Taft, Chief Justice of the United States this 24th day of March, in the year one thousand nine hundred and twenty-seven and the Independence of the United States the one hundred and fifty-first.

Alex Gilchrist, Jr., Clerk of the United States District Court for the Southern District of New York.

The foregoing writ is hereby allowed and the amount of the Bond is hereby fixed at $250.00.

Francis A. Winslow, United States District Judge.

[fol. 3] Citation, in usual form, omitted in printing.

[fol. 4] Summons omitted in printing.

[fol. 5] In United States District Court, Southern District of New York

L. 36-251, Calendar No. 869

Isaac Untermyer, Plaintiff,

vs.

Charles W. Anderson, as Collector of Internal Revenue of the United States of America for the Third District of New York, Defendant

Complaint

To the Honorable District Court of the United States for the Southern District of New York:

Plaintiff above named by Guggenheimer, Untermyer & Marshall, his attorneys herein for complaint against the above named defendant, complains and alleges:

First. At all the times hereinafter stated plaintiff was and still is a resident of the Borough of Manhattan of the

City of New York of the County of New York and the State of New York and within the judicial district of the District Court of the United States for the Southern District of New York.

Second. For some time prior to January 1st, 1925, and up to the time of the commencement of this action the defendant herein was and he still is the duly appointed, duly qualified and acting Collector of Internal Revenue of the [fol. 6] United States in and for the Southern District of the State of New York.

Third. On or about April 1st, 1925, in compliance with the Act of Congress of June 2nd, 1924, known as the Federal Revenue Act of 1924, and pursuant to the provisions of Section- 319, 320, 321, 322 and 324 of said Act, the plaintiff made a return for the twelve months ending December 31st. 1924, setting forth an itemized inventory of gifts made by plaintiff during the calendar year of 1924, showing the nature and character of certain gifts which the plaintiff had made during said year and showing that the fair market value of the property covered by such gifts as of the date of the gifts aggregated the sum of $193,100; that there was deductible therefrom charitable gifts which as of the date of the making thereof were of the fair value of $600; that the deductions from the value of said gifts amounted to $50,600; that the amount of such gifts as taxable under the provisions of the Act referred to was the sum of $142,500; and that the tax thereon on the basis of the provisions of the Revenue Act of 1924, above referred to was the sum of $2,775. Said return was made under protest.

Fourth. On or about April 1st, 1925, acting solely under duress and compulsion the plaintiff in order to avoid the imposition and collection of penalties and interest charges on the amount of the aforesaid claimed tax paid to the defendant under protest the said sum of $2,775 with accrued interest thereon to that date amounting to the sum of $7.86, or in all the sum of $2,782.86. At the time of and with the making of said payment plaintiff caused to be delivered to [fol. 7] the defendant a protest in writing, a copy of which is hereto annexed as Exhibit A, which is made a part of this complaint as though here fully and at length set forth.

At the time of making such payment the plaintiff received from the defendant a receipt or written acknowledgment of said payment, a copy of which writing is hereto annexed as Exhibit B, which is made a part of this complaint as though here fully and at length set forth.

Fifth. Thereafter and on or about April 3rd, 1925, plaintiff duly filed with the defendant herein a claim for the refund of said taxes so paid and the interest thereon in the form hereto annexed, marked Exhibit C, which is hereby made a part of this complaint as though here fully and at length set forth. Attached to Exhibit C herein referred to was a copy of Exhibit A hereto annexed.

Sixth. More than six months have elapsed since the filing of the claim mentioned in paragraph Fifth of this complaint.

Seventh. On or about August 3rd, 1925, the Commissioner of Internal Revenue of the Treasury Department of the United States rejected the plaintiff's aforesaid claim for refund in its entirety, which rejection is shown by a letter writing dated August 3rd 1925, a copy of which is hereto annexed and marked Exhibit D, which is made a part of this complaint as though here fully and at length set forth.

Eighth. Upon information and belief, the tax so assessed and collected by the defendant herein from the plaintiff, amounting to the sum of $2,775, together with the claimed interest thereon amounting to $7.86, was unlawfully collected from the plaintiff on the following grounds, viz:

[fol. 8] (1) That the so-called Gift Tax is unconstitutional and void, in that plaintiff was thereby without due process of law deprived of (a) property belonging to him and of an essential attribute of such property and (b) of the liberty to dispose of his property, in violation of Article V of the Amendments to the Constitution of the United States.

(2) That the tax sought to be imposed upon plaintiff because of the making of such gifts is not a valid exercise of the taxing power vested in the Congress of the United States.

(3) That such tax is neither an income tax, an excise tax, a death duty, an estate or succession tax, nor an impost, authorized by the Constitution of the United States, but is a direct tax not laid in proportion to the census and enumeration directed to be taken pursuant to the Constitution and is therefore violative of Article I, Section 9, subdivision 4, of the Constitution of the United States.

(4) That Congress in any event had no right, power or authority to levy or assess against the plaintiff any tax upon gifts which plaintiff had made in absolute form prior to June 2nd, 1924, and that the gifts covered by the return of the plaintiff were all made prior to June 2nd, 1924, and before the adoption of the Revenue Act of Congress of 1924.

Ninth. By reason of the matters herein before stated, there is now due and owing to the plaintiff from the defendant the sum of $2,782.86 with interest thereon from April 1st, 1925.

Tenth. The matters in controversy herein arise under and require the construction of the Constitution of the United States and the laws of the United States of America.

[fol. 9] Wherefore plaintiff demands judgment in his favor and against the defendant for the said sum of $2,782.86 with interest thereon from April 1st, 1925, together with the costs and disbursements of this action.

Guggenheimer, Untermyer & Marshall, Attorneys for Plaintiff.

Office and Post Office Address: 120 Broadway, Borough of Manhattan of the City of New York.

Duly sworn to by Isaac Untermyer. Jurat omitted in printing.

[fol. 10] EXHIBIT A TO COMPLAINT

New York, April 1, 1925.

To the Collector of Internal Revenue, Third District, New York:

I protest against being assessed for a tax upon the gifts made by me during the calendar year 1924 as herein reported purusant to Section 319 of the Act of Congress of June 2, 1924, on the following grounds, among others:

(1) That the so-called Gift Tax is unconstitutional and void, in that I would be thereby deprived of (a) property belonging to me and of an essential attribute of such property and (b) of the liberty to dispose of my property, without due process of law, in violation of Article V of the Amendments to the Constitution of the United States.

(2) That the tax sought to be imposed upon me because of the making of such gifts, is not a valid exercise of the taxing power vested in the Congress of the United States.

(3) That such a tax is neither an income tax, an excise tax, a death duty, an estate or succession tax, nor an impost, authorized by the Constitution of the United States, but is a direct tax not laid in proportion to the census and enumeration directed to be taken pursuant to the Constitution, and is therefore violative of Article 1, Section 9, subdivision 4, of the Constitution of the United States.

For the reasons aforesaid, this return is made under coercion, and is not to be regarded as in any way a waiver of my right to object to the enforcement of such tax and to contest the validity of any assessment or determination that may be made requiring the payment of such tax; and [fol. 11] that yielding to the duress imposed by Section 324 of the aforesaid Act of June 2, 1924, in order to avoid the threatened seizure of my property and the incurring of the penalties prescribed by the law in the event of the failure to pay such tax on or before March 15, 1925, I hereby make payment of such tax under protest, and notify you that I shall institute legal proceedings against you for the recovery of the sum so paid, which has been unlawfully and against my will and under duress exacted from me.

Issac Untermyer.

EXHIBIT B TO COMPLAINT

Form 802 A—December, 1924

Treasury Department, Internal Revenue Service

Gift Tax Receipt

Donor's Copy (in Duplicate)

Collector 3rd District of New York, at 250 West 57th St., N. Y. C.

Actual date of payment: Apr. 1, 1925.

NOTE.—Payment of the tax indicated by the return on Form 706-A is not conclusive as to ultimate tax liability. An investigation will be conducted to verify the accuracy of the return. If tax in excess of or less than the amount indicated by the return is disclosed by the Commissioner's audit, due notice thereof will be given.

Isaac Untermyer, 120 Broadway, New York City.
[fol. 12] List 23A, (Month) April, (Page) 1925, Line —, Calendar Year 1925.

Returned tax	$2,775 00
Total	$2,775 00

(Stamp:) Office of the Collector of Internal Revenue, Third District, New York. B. Received April 1, 1925, with Remittance. B.

Form 803 A—December, 1924

Treasury Department, Internal Revenue Service

Gift Tax Receipt

Donor's Copy (in Duplicate)

Collector 3rd District New York, at 250 West 57th, St., N. Y. C.

Actual date of payment: April 1st, 1925.

NOTE.—Payment of the tax indicated by the return on Form 706-A is not conclusive as to ultimate tax liability.

An investigation will be conducted to verify the accuracy of the return. If tax in excess of or less than the amount indicated by the return is disclosed by the Commissioner's audit, due notice thereof will be given.

Isaac Untermyer, 120 Broadway, New York City.
[fol. 13] List 23A, (Month) April, (Page) 1925, Line —, Calendar Year 1924.

Interest 16 days 6%	$7.86
Total	$7.86

(Stamp:) Office of the Collector of Internal Revenue, Third District, New York. B. Received April 1, 1925, with Remittance. B.

EXHIBIT C TO COMPLAINT

Form 843—Jan., 1922

Treasury Department, Internal Revenue Service

Claim for Refund of Taxes Illegally Collected

STATE OF NEW YORK,
County of New York, ss:

Isaac Untermyer, 300 Park Avenue, New York, N. Y. 120 Broadway, New York, N. Y.

(Stamp:) Office of the Collector of Internal Revenue, Third District, New York. 10. Received Apr. 3, 1925. No Remittance. 10.

This deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of [fol. 14] the taxpayer named, and that the facts given below with reference to said statement are true and complete:

Period	Year
From Jan. 1	1924
To Dec. 31	1924

1. Business in which engaged: Law.
2. Character of assessment or tax: 1924 Gift tax.
3. Amount of assessment or stamps purchased: $2,775.00.

4. Reduction of Tax Liability requested (Income and Profits Tax) & interest: $7.86.

5. Amount to be abated: none. $2,782.86.

6. Amount to be refunded (or such greater amount as is legally refundable) exclusive of int.: $2,782.86.

7. Dates of payment (see Collector's receipts or indorsements of canceled checks): From Apr. 1; Apr. 1, 1925.

8. District in which return (if any) was filed: Third New York.

9. District in which unpaid assessment appears: None unpaid.

10. Amount of overpayment claimed as credit: None.

11. Unpaid assessment against which credit is asked; period from: None.

Deponent verily believes that this application should be allowed for the reasons stated in a letter of protest filed with the Collector of Internal Revenue of the Third District of New York on April 1, 1925 as a part of my 1924 Gift Tax Return, a true copy of which is hereto annexed [fol. 15] and is made a part of this claim of refund as though here and at length fully set forth.

I attach hereto a copy of an original letter under which the said collecter acknowledges receipt of my said return and payment of the tax.

I request and hereby demand a hearing on this claim, notice of which is requested to be sent to me at above mentioned business address.

(Signed) Isaac Untermeyer, 120 Broadway, New York, N. Y.

Sworn to and subscribed before me this 2nd day of April, 1925. Louis Malthaner, Notary Public, Kings Co., No. 168. Kings Register No. 6171. Certificate filed in New York County No. 432. New York Register's No. 6369. My commission expires March 30, 1926. (Seal.)

[fol. 16] EXHIBIT D TO COMPLAINT

Treasury Department, Washington, Office of Commissioner of Internal Revenue

Address Reply to Commissioner of Internal Revenue and refer to MT-ET-GT-1-C1. R-EBT.
District of Second New York.
Gifts made by Isaac Untermyer.
Calendar Year 1924.

August 3, 1925.

Isaac Untermyer, Esq., 120 Broadway, New York, N. Y.:

SIR: The Bureau has examined the claim filed by you for refund of $2,782.86, gift tax paid under the provisions of the Revenue Act of 1924.

Your claim is based on the contention that the gift tax law, under which this tax was paid, is unconstitutional and void.

The Bureau, being an administrative unit, is not authorized to pass upon the constitutionality of this Act, nor has it been brought to the attention of the Bureau that the unconstitutionality of the Act has been judicially determined by any court of competent jurisdiction. Until this is done, the Bureau has no alternative but to strictly comply with the express provisions of the law as enacted by Congress.

Therefore, your claim for refund of $2,782.86 is rejected in its entirety.

[fol. 17] For your information, you are advised that the Bureau has not, as yet, audited this case, nor determined the tax liability.

Respectfully, D. H. Blair, Commissioner.

MHP.

IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER

The defendant above-named, by his attorney, Emory R. Buckner, United States Attorney for the Southern District of New York, answering the complaint herein, denies:

First. Upon information and belief, each and every allegation contained in paragraph numbered "Eighth" of the complaint.

[fol. 18] Second. Upon information and belief, each and every allegation contained in paragraph numbered "Ninth" of the complaint.

Wherefore, defendant demands judgment dismissing the complaint together with the costs of this action.

Emory R. Buckner, United States Attorney for the Southern District of New York, Attorney for Defendant.

Office & P. O. Address: U. S. Courts & P. O. Bldg., Borough of Manhattan, City of New York.

Duly sworn to by Charles W. Anderson. Jurat omitted in printing.

[fol. 19] In United States District Court

[Title omitted]

Order Reviving Action—October 9, 1926

Upon the subjoined consent of Emory R. Buckner, United States Attorney, as attorney for the defendant in the above entitled action, and on motion of Guggenheimer, Untermyer & Marshall, the atorneys for Fannie E. Untermyer as executrix and Edward D. Untermyer as executor of the Last Will and Testament of Isaac Untermyer, deceased, who died August 31, 1926, it is hereby

Ordered that the above entitled action be and the same hereby is revived in favor of Fannie E. Untermyer as executrix and Edward D. Untermyer as executor of the Last Will and Testament of Isaac Untermyer, deceased, as plaintiffs in this action, and it is further

[fol. 20] Ordered that the said action hereby stands revived in behalf of said Fannie E. Untermyer as executrix and Edward D. Untermyer as executor under the Last Will and Testament of Isaac Untermyer, deceased, as parties plaintiff herein, and that the title of this action be and the

same hereby is amended accordingly without prejudice to any of the proceedings had in this action.

F. A. Winslow, U. S. D. J.

I hereby approve the form of the foregoing order and consent to the making and entry thereof without notice.

Dated, New York, October 8th, 1926.

Emory R. Buckner, United States Attorney, Attorney for Defendant.

[fol. 21] In United States District Court

[Title omitted]

Minute Entry—March 18, 1927

Now comes the plaintiff by their Attys., Guggenheimer, Untermyer & Marshall & Louis Marshall of counsel, and moves the trial of this cause. Likewise come the defendant by his Atty., E. R. Buckner & Thos. J. Crawford of counsel.

Thereupon a jury is duly impaneled and sworn and the cause proceeds to trial. At close of entire case Plff.'s Atty. [fol. 22] moves for a direction of a verdict for Plff. Denied, Exc. Deft.'s Atty. moves for a direction of a verdict for Deft. & for a dismissal of the complaint. Motion granted. Court directs verdict for Deft. & dismisses complaint. Ex. for Plff.

An Extract of the Minutes.

Alex. Gilchrist, Jr., Clerk.

A Copy. W. J. E.

In United States District Court, Southern District of New York

L. 36-251

Fannie E. Untermyer, as Executrix, and Edward D. Untermyer, as Executor, under the Last Will and Testament of Isaac Untermyer, Deceased,

vs.

Charles W. Anderson, as Collector of Internal Revenue of the United States of America for the Third District of New York

Judgment—Filed March 22, 1927

The issues in this action having been regularly brought on for trial before the Hon. Francis A. Winslow and a jury at a stated term of this court, held on the 18th day of March, 1927, at the United States Court and Post Office Building, [fol. 23] in the Borough of Manhattan, City of New York, and the plaintiff herein appearing by Guggenheimer, Untermyer & Marshall, Louis Marshall, Esq., of counsel, and the defendant appearing by Emery R. Buckner, United States Attorney for the Southern District of New York, Thomas J. Crawford, Assistant United States Attorney, of counsel, and the allegations and proofs on behalf of the plaintiff and the defendant having been heard and considered, and thereafter at the close of the testimony the attorneys for the plaintiff having moved for the direction of a verdict in favor of the plaintiff, which motion was denied and an exception was allowed to plaintiff, and the attorney for the defendant having moved for a direction in favor of the defendant and for a dismissal of the complaint, and this Honorable Court having directed that a verdict be entered in favor of the defendant and that the complaint be dismissed, the plaintiff being allowed an exception to such ruling, and the defendant's costs having been taxed at the sum of $30.00 by the Clerk of this court,

Now, on motion of Emory R. Buckner, United States Attorney, attorney for the defendant, it is

Ordered, Adjudged and Decreed that the complaint of the plaintiffs in this action be and the same hereby is dismissed upon the merits, and it is further

Ordered and Adjudged that the defendant Charles W. Anderson, as Collector of Internal Revenue of the United States of America for the Third District of New York, recover of the plaintiffs Fannie E. Untermyer, as Executrix, [fol. 24] and Edward D. Untermyer, as Executor, under the Last Will and Testament of Isaac Untermyer, deceased, the sum of $30.00 costs as taxed, and that execution issue therefor.

Judgment signed this 22nd day of March, 1927.

Alex Gilchrist, Jr., Clerk.

In United States District Court

[Title omitted]

Bill of Exceptions

Caption

This cause came on for trial before Hon. Francis A. Winslow, United States District Judge and a jury in the [fol. 25] United States District Court of the Southern District of New York on the 18th day of March, 1927.

Guggenheimer, Untermyer & Marshall, of New York City, appeared as attorneys for the plaintiffs and Louis Marshall, of Counsel.

The defendant appeared by Emory R. Buckner, Esq., United States Attorney for the Southern District of New York and Thomas J. Crawford, Esq., Assistant United States Attorney, of Counsel.

A jury was empanelled and sworn.

The following agreed statement of facts was then read on behalf of the plaintiffs:

Agreed Statement of Facts

First: At all the times hereinafter stated Isaac Untermyer was a resident of the Borough of Manhattan, of the City of New York, of the County of New York and the State of New York, and within the judicial district of the District Court of the United States for the Southern District of New York. He died August 31, 1926, and by order of this

Court dated October 9, 1926, the plaintiffs herein were substituted as parties plaintiffs to this action without prejudice to the proceedings had in the action.

Second. For some time prior to January 1st, 1925, and up to the time of the commencement of this action the defendant herein was and he still is the duly appointed, duly qualified and acting Collector of Internal Revenue of the United States in and for the Third District of the State of New York.

Third. On or about April 1st, 1925, in compliance with the Act of Congress of June 2nd, 1924, known as the Federal Revenue Act of 1924, and pursuant to the provisions [fol. 26] of Sections 319, 320, 321, 322 and 324 of said Act, the plaintiffs' testator made a return for the twelve months ending December 31st, 1924, setting forth an itemized inventory of gifts made by plaintiffs' testator during the calendar year of 1924, showing the nature and character of certain gifts which the plaintiffs' testator had made during said year and showing that the fair market value of the property covered by such gifts as of the date of the gifts aggregated the sum of $193,100; that there was deductible therefrom charitable gifts which as of the date of the making thereof were of the fair value of $600; that the deductions from the value of said gifts amounted to $50,600; that the amount of such gifts as taxable under the provisions of the Act referred to was the sum of $142,500; and that the tax thereon on the basis of the provisions of the Revenue Act of 1924, above referred to, was the sum of $2,775. Said return was made under protest.

Fourth. On or about April 1st, 1925, acting solely under duress and compulsion the plaintiffs' testator in order to avoid the imposition and collection of penalties and interest charges on the amount of the aforesaid claimed tax paid to the defendant under protest the said sum of $2,775, with accrued interest thereon to that date, amounting to the sum of $7.86, or in all the sum of $2,782.86. At the time of and with the making of said payment, plaintiffs' testator caused to be delivered to the defendant a protest in writing, a copy of which is annexed to the complaint as Exhibit A, which is made a part of this agreed statement of facts as though here fully and at length set forth. At the time of making

such payment the plaintiffs' testator received from the defendant a receipt or written acknowledgment of said pay-
[fol. 27] ment, a copy of which writing is annexed to the complaint as Exhibit B, which is made a part of this agreed statement of facts as though here fully and at length set forth.

Fifth. Thereafter and on or about April 3rd, 1925, plaintiffs' testator duly filed with the defendant herein a claim for the refund of said taxes so paid and the interest thereon in the form annexed to the complaint, marked Exhibit C, which is hereby made a part of this agreed statement of facts as though here fully and at length set forth. Attached to Exhibit C herein referred to was a copy of Exhibit A, hereinbefore referred to.

Sixth. More than six months have elapsed since the filing of the claim mentioned in Paragraph Fifth of this agreed statement of facts.

Seventh. On or about August 3rd, 1925, the Commissioner of Internal Revenue of the Treasury Department of the United States rejected the plaintiffs' aforesaid claim for refund in its entirety, which rejection is shown by a letter writing dated August 3rd, 1925, a copy of which is annexed to the complaint and marked Exhibit D, which is made a part of this agreed statement of facts as though here fully and at length set forth.

Eighth. That the gift made by plaintiffs' testator upon which the tax herein referred to was imposed was made on the 23rd day of May, 1924.

Mr. Marshall, on behalf of the plaintiffs, offered in evidence the following documents:

OFFERS IN EVIDENCE

1. Letter of protest of Isaac Untermyer, dated April 1, 1925, a copy of which is attached to the complaint herein as Exhibit A.
[fol. 28] The same was received and marked in evidence as Plaintiffs' Exhibit 1.

2. The two receipts of the Collector of Internal Revenue for $2,775.00 and $7.86 respectively, showing the payment of the gift tax in question, copies of which are attached to the complaint as Exhibit B.

The same were received and marked in evidence as Plaintiffs' Exhibit 2.

3. The application for the refund of the tax in question, a copy of which is attached to the complaint herein as Exhibit C.

The same was received and was marked in evidence as Plaintiffs' Exhibit 3.

4. The letter of the Commissioner of Internal Revenue of August 3rd, 1925, which rejected the refund claim, a copy of which is attached to the complaint herein as Exhibit D.

The same was received in evidence and was marked Plaintiffs' Exhibit 4.

5. The stipulation entered into between the attorneys for the parties hereto, dated March 15th, 1927, under which it was agreed that the amount of the recovery prayed for by the plaintiffs be reduced by the sum of $420.93, on account of a refund made to the plaintiffs on account of said gift tax because of the retroactive provisions of the Revenue Act of 1926 which reduced the gift tax by said amount, which refund was accepted by the plaintiffs' testator without prejudice to his claim that the gift tax in question was unconstitutional, illegal, null and void, and without prejudice to his rights in this action to recover the sum of $2,782.86, less, however, the amount so refunded.

[fol. 29] The plaintiffs then rested their case.

The defendant rested.

Thereupon Mr. Marshall moved the Court, as follows:

MOTION FOR DIRECTED VERDICT FOR PLAINTIFF

"I move for the direction of a verdict in favor of the plaintiff and for judgment against the defendant for the sum of $2,361.93, with interest thereon from April 1, 1925, on the following grounds:

(1) That the provisions of Sections 319, 320, et seq., of the Revenue Act of 1924, imposing a tax on gifts, are null and void, on the ground that the imposition of such a tax constitutes a violation of the provision contained in the Fifth Amendment to the Constitution of the United States, in that it deprived the donor of property without due process of law.

(2) That the provisions of Sections 319, 320, et seq., of the Revenue Act of 1924, imposing a tax on gifts, are null and void, on the ground that the imposition of such a tax constitutes a violation of the provision contained in the Fifth Amendment to the Constitution of the United States, in that it deprived the donor of the liberty of disposing of his property without due process of law.

(3) That the provisions of Sections 319, 320, et seq., of the Revenue Act of 1924, imposing a tax on gifts, are null and void, on the ground that the imposition of such a tax constitutes a violation of the provision contained in the Fifth Amendment to the Constitution of the United States, in that it deprived the donor of one of the essential attributes of the property which was the subject of the gift on which a tax has been levied, namely, the right to dispose [fol. 30] of it in accordance with his own free will and unhampered by the imposition of a tax on the exercise of that right.

(4) That the provisions of Sections 319, 320, et seq., of the Revenue Act of 1924, imposing a tax on gifts, are null and void, on the ground that the imposition of such a tax constitutes a violation of the provision contained in the Fifth Amendment to the Constitution of the United States, in that the provisions of the Revenue Law imposing a gift tax are in legal effect the equivalent of a prohibition against the making of a gift and constitute an impairment of the right of disposition by imposing restrictive conditions upon the exercise of such right.

(5) That the provisions of Sections 319, 320, et seq., of the Revenue Act of 1924, imposing a tax on gifts, are null and void, on the ground that the imposition of such a tax constitutes a violation of the provision contained in the Fifth Amendment to the Constitution of the United States,

in that the tax upon the donor is in effect one upon the exercise of one of the fundamental rights incident to the ownership of property, the tax being imposed upon the donor in connection with the exercise of that right and his exercise of such right not being a privilege derived from any statutory authority or governmental license or consent.

(6) That the provisions of Sections 319, 320, et seq., of the Revenue Act of 1924, imposing a tax on gifts, are null and void, on the ground that the imposition of such a tax constitutes a violation of the provision contained in the Fifth Amendment to the Constitution of the United States, in that the tax imposed upon the donor because of the [fol. 31] making of the gift is not predicable upon a valid exercise of the taxing power vested in Congress, and the imposition of such tax is in the nature of an act of confiscation.

(7) That the provisions of Sections 319, 320, et seq., of the Revenue Act of 1924, imposing a tax on gifts, are null and void, on the ground that the tax imposed is neither an income tax, an excise tax, a death duty, an estate or succession tax, nor an impost tax, authorized by the Constitution of the United States, but constitutes a direct tax not laid or imposed in proportion to the census and an enumeration directed to be taken pursuant to the Constitution of the United States, and is violative of Article I, Section 9, subdivision 4, of the Constitution of the United States.

(8) That the provisions of Sections 319, 320, et seq., of the Revenue Law of 1924, imposing a tax on gifts, are null and void, on the ground that the imposition of such a tax constitutes a violation of the provision contained in the Fifth Amendment to the Constitution of the United States, in that Congress did not have the right, power or authority under the Constitution of the United States to levy or assess any tax upon executed gifts made inter vivos, and the gift here in question was concededly such a gift and not a gift causa mortis.

(9) That the provisions of Sections 319, 320, et seq., of the Revenue Act of June 2, 1924, did not apply to the gift made by the plaintiffs' testator on May 23, 1924, and that the terms of the said statutes were not retroactive.

The motion for a direction of a verdict in favor of the plaintiffs was denied.

An exception was allowed by the Court to counsel for the plaintiffs to the denial of such motion.

[fol. 32] Motion for Directed Verdict for Defendant

Thereupon Mr. Crawford moved for a direction of a verdict in favor of the defendant and for a dismissal of the Complaint upon the authority of Anderson, Collector v. McNair, decided January 10, 1927, by the United States Circuit Court of Appeals for the Second Circuit. Such motion was granted.

The plaintiffs' counsel was allowed an exception by the Court to the direction of a verdict in favor of the defendant.

Verdict

Thereupon, in accordance with the direction of the Court, the jury rendered a verdict in favor of the defendant.

Notes re Plaintiffs' Exhibits 1 to 4, inc.

Plaintiffs' Exhibit 1

Letter of protest of Isaac Untermyer, dated April 1, 1925, a copy of which is attached to the complaint herein as Exhibit A (printed at p. 10 of this record).

Plaintiffs' Exhibit 2

Two tax receipts of Collector of Internal Revenue for the payment of the gift tax in question, copies of which are attached to the complaint herein as Exhibit B (printed at pp. 10 and 11 of this record).

Plaintiffs' Exhibit 3

Application for refund of tax in question, a copy of which is attached to the complaint herein as Exhibit C (printed at p. 13 of this record).

Plaintiffs' Exhibit 4

Letter of Commissioner of Internal Revenue of August 3rd, 1925, rejecting refund claim, a copy of which is attached to the complaint herein as Exhibit D (printed at p. 16 of this record).

[fol. 33] Plaintiffs' Exhibit 5

Stipulation for reduction of amount of judgment prayed for by plaintiffs by $420.93, or to the sum of $2,361.93, with interest from April 1, 1925, a copy of which stipulation is as follows:

PLAINTIFFS' EXHIBIT 5

Stipulation Reducing Amount of Judgment Claimed by $420.93

IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

L. 36-251, Calendar No. 869

FANNIE E. UNTERMYER, as Executrix, and EDWARD D. UNTERMYER, as Executor, under the Last Will and Testament of Isaac Untermyer, Deceased, Plaintiffs,

against

CHARLES W. ANDERSON, as Collector of Internal Revenue of the United States of America for the Third District of New York, Defendant

It is hereby stipulated and agreed by and between the parties to the above entitled action that since the commence-[fol. 34] ment thereof and on August 4, 1926 there was refunded to Isaac Untermyer, now deceased, the original

party plaintiff, the sum of $420.93 on account of the Gift Tax sued upon herein, which amount so refunded represents a reduced amount of the tax originally assessed under the retroactive provisions of the Revenue Act of 1926 which refund was accepted by said Isaac Untermyer upon the understanding and agreement that the acceptance thereof should be without prejudice to his claim that the Gift Tax is unconstitutional, illegal, null and void and also without prejudice to his rights in the above action to recover the $2,782.86 gift tax paid less however the amount so refunded.

Dated, March 15, 1927.

Guggenheimer, Untermyer & Marshall, Attorneys for Plaintiffs. Emory R. Buckner, United States Attorney for the Southern District of New York, Attorney for Defendant.

[fol. 35] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION AS TO BILL OF EXCEPTIONS

It is hereby stipulated and agreed that the foregoing Bill of Exceptions is hereby agreed to and that it constitutes a true and correct transcript of the minutes of the trial and the exhibits offered in evidence, and that the same constitutes all of the evidence adduced upon the trial and that the said record as so printed may be ordered on file as the Bill of Exceptions in this case.

Dated, New York, March 31, 1927.

Guggenheimer, Untermyer & Marshall, Attorneys for Plaintiffs-in-Error. Emory R. Buckner, United States Attorney for the Southern District of New York, Attorney for Defendant-in-error.

[fol. 36] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER SETTLING BILL OF EXCEPTIONS

Upon the foregoing stipulation of the attorneys for the respective parties hereto, the within Bill of Exceptions is hereby settled and ordered on file.

Dated, April 1, 1927.

Francis A. Winslow, United States District Judge for the Southern District of New York.

[fol. 37] IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENTS OF ERROR

And now comes Fannie E. Untermyer, as Executrix, and Edward D. Untermyer, as Executor, of the Last Will and Testament of Isaac Untermyer, deceased, and file these their assignment of errors, upon which they rely upon the prosecution of their errors in the above entitled cause from the judgment entered herein by this Court on the 22nd day of March, 1927, and aver that the District Court of the United States for the Southern District of New York, in the course of the trial of this action and in connection with the rendition of the verdict of the jury herein, did make the following errors, viz.:

First. In that the District Court erred in refusing to hold that the provisions of Sections 319, 320, et seq., of the Revenue Act of 1924, imposing a tax on gifts, are null and [fol. 38] void, on the ground that the imposition of such a tax constitutes a violation of the provision contained in the Fifth Amendment to the Constitution of the United States, in that it deprived the donor of property without due process of law.

Second. In that the District Court erred in refusing to hold that the provisions of Sections 319, 320, et seq., of the

Revenue Act of 1924, imposing a tax on gifts, are null and void, on the ground that the imposition of such a tax constitutes a violation of the provisions contained in the Fifth Amendment to the Constitution of the United States, in that it deprived the donor of the liberty of disposing of his property without due process of law.

Third. In that the District Court erred in refusing to hold the provisions of Sections 319, 320, et seq., of the Revenue Act of 1924, imposing a tax on gifts, null and void, on the ground that the imposition of such a tax constitutes a violation of the provision contained in the Fifth Amendment to the Constitution of the United States, in that it deprived the donor of one of the essential attributes of the property which was the subject of the gift on which a tax has been levied, namely, the right to dispose of it in accordance with his own free will and unhampered by the imposition of a tax on the exercise of that right.

Fourth. In that the District Court erred in refusing to hold that the provisions of Sections 319, 320, et seq., of the Revenue Act of 1924, imposing a tax on gifts, are null and void, on the ground that the imposition of such a tax constitutes a violation of the provision contained in the Fifth [fol. 39] Amendment to the Constitution of the United States, in that the provisions of the Revenue Law imposing a gift tax are in legal effect the equivalent of a prohibition against the making of a gift, and constitute an impairment of the right of disposition by imposing restrictive conditions upon the exercise of such right.

Fifth. In that the District Court erred in refusing to hold that the provisions of Sections 319, 320, et seq., of the Revenue Act of 1924, imposing a tax on gifts, are null and void, on the ground that the imposition of such a tax constitutes a violation of the provision contained in the Fifth Amendment to the Constitution of the United States, in that the tax upon the donor is in effect one upon the exercise of one of the fundamental rights incident to the ownership of property, the tax being imposed upon the donor in connection with the exercise of that right and his exercise of such right not being a privilege derived from any statutory authority or governmental license or consent.

Revenue Act of 1924, imposing a tax on gifts, are null and void, on the ground that the imposition of such a tax constitutes a violation of the provisions contained in the Fifth Amendment to the Constitution of the United States, in that it deprived the donor of the liberty of disposing of his property without due process of law.

Third. In that the District Court erred in refusing to hold the provisions of Sections 319, 320, et seq., of the Revenue Act of 1924, imposing a tax on gifts, null and void, on the ground that the imposition of such a tax constitutes a violation of the provision contained in the Fifth Amendment to the Constitution of the United States, in that it deprived the donor of one of the essential attributes of the property which was the subject of the gift on which a tax has been levied, namely, the right to dispose of it in accordance with his own free will and unhampered by the imposition of a tax on the exercise of that right.

Fourth. In that the District Court erred in refusing to hold that the provisions of Sections 319, 320, et seq., of the Revenue Act of 1924, imposing a tax on gifts, are null and void, on the ground that the imposition of such a tax constitutes a violation of the provision contained in the Fifth [fol. 39] Amendment to the Constitution of the United States, in that the provisions of the Revenue Law imposing a gift tax are in legal effect the equivalent of a prohibition against the making of a gift, and constitute an impairment of the right of disposition by imposing restrictive conditions upon the exercise of such right.

Fifth. In that the District Court erred in refusing to hold that the provisions of Sections 319, 320, et seq., of the Revenue Act of 1924, imposing a tax on gifts, are null and void, on the ground that the imposition of such a tax constitutes a violation of the provision contained in the Fifth Amendment to the Constitution of the United States, in that the tax upon the donor is in effect one upon the exercise of one of the fundamental rights incident to the ownership of property, the tax being imposed upon the donor in connection with the exercise of that right and his exercise of such right not being a privilege derived from any statutory authority or governmental license or consent.

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NOTICE OF APPLICATION FOR WRIT OF CERTIORARI TO BE DIRECTED TO UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

Supreme Court of the United States

OCTOBER TERM, 1926.

No.

FANNIE E. UNTERMYER as Executrix and EDWARD D. UNTERMYER as Executor of the Last Will and Testament of Isaac Untermyer, deceased,

Petitioners,

against

CHARLES W. ANDERSON, as Collector of Internal Revenue of the United States of America for the Third District of New York,

Respondent.

Sirs:

PLEASE TAKE NOTICE that upon the annexed petition of Fannie E. Untermyer as Executrix and Edward D. Untermyer as Executor of the Last Will and Testament of Isaac Untermyer, deceased, and a certified copy of the entire transcript of the record of this cause herewith

submitted, and also the brief of the petitioners hereto annexed, also to be submitted on the presentation of the petition, an application will be made to the Supreme Court of the United States for a writ of certiorari to be directed to the United States Circuit Court of Appeals for the Second Circuit, wherein the record is now lodged, to review the determination of said Court rendered on April 12, 1927, which affirmed the judgment of the United States District Court rendered March 22, 1927, dismissing the complaint.

Dated, New York, April 14, 1927.

Yours, etc.,

LOUIS MARSHALL,
Solicitor and Counsel for Petitioners,
Office and Post Office Address,
No. 120 Broadway,
Borough of Manhattan,
City of New York.

To:

CHARLES H. TUTTLE, Esq.,
United States Attorney for the
Southern District of New York,
United States Post Office Building,
(Manhattan) City of New York.

Hon. JOHN G. SARGENT,
Attorney General of the United States,
Washington, D. C.

PETITION OF PLAINTIFFS-IN-ERROR FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926.

No.

FANNIE E. UNTERMYER as Executrix and EDWARD D. UNTERMYER as Executor of the Last Will and Testament of Isaac Untermyer, deceased,
Petitioners,

against

CHARLES W. ANDERSON, as Collector of Internal Revenue of the United States of America for the Third District of New York,
Respondent.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioners, Fannie E. Untermyer as Executrix and Edward D. Untermyer as Executor of the Last Will and Testament of Isaac Untermyer, deceased, late a citizen of the United States and a resident of the City of New

York, County and State of New York, pray for a writ of certiorari to review the determination by the United States Circuit Court of Appeals for the Second Circuit, whereby the judgment of the District Court for the Southern District of New York, rendered herein on March 22, 1927, was affirmed, on the ground that such determination and the matter in controversy arise under and involve the construction of the Constitution of the United States and the laws of the United States.

And the petitioners respectfully show:

FIRST: They are and each of them is a resident of the City, County and State of New York, within the judicial district of the District Court of the United States for the Southern District of New York.

SECOND: In November, 1925, Isaac Untermyer, their testator, commenced an action in the said District Court against the above-named respondent to recover the amount of a tax he paid (under protest) to him as Collector of Internal Revenue of the United States for the Third District of New York on an asserted claim that such amount was due and payable to the United States of America as a tax under Sections 319 to 324 of the Revenue Act of Congress of 1924 on gifts which he had made during the year 1924. The respondent appeared and interposed an answer which admitted all of the allegations of fact set forth in the complaint.

THIRD: On August 31, 1925, Isaac Untermyer died and the petitioners were duly respectively appointed executrix and executor of his last will and testament, and by an order made by the said District Court the action was revived in their behalf.

FOURTH: The cause was tried in the said District Court before Honorable Francis A. Winslow, District Judge, and a jury, on March 18, 1927, and resulted in the direction of a verdict in favor of the respondent and against the petitioners. On March 22, 1927, a judgment was entered in the District Court dismissing the complaint upon the merits with costs in favor of the respondent.

FIFTH: The petitioners then sued out a writ of error to the United States Circuit Court of Appeals for the Second Circuit, assigning as error that the judgment so rendered was contrary to law, in that the Gift Tax Law as embodied in the Revenue Act of 1924 was unconstitutional and violative of the Constitution of the United States, for reasons set forth in paragraph Eighth hereof, and did not apply to the gift which the petitioners' testator had made prior to the adoption of the provisions of the Gift Tax Law, which became effective on June 2, 1924, after the making of the gift. On April 12, 1927, the United States Circuit Court of Appeals for the Second Circuit rendered its decision affirming the judgment of the United States District Court for the Southern District of New York on the authority of its decision in *McNeir* v. *Anderson, Collector,* rendered on January 10, 1927, which held that the Gift Tax Law was not unconstitutional. That case is now before this Honorable Court for review upon a writ of certiorari recently allowed. On April 13, 1927, the said United States Circuit Court of Appeals issued its order in this acton for a mandate for the affirmance of said judgment.

SIXTH: The material facts in the case are that on or about May 23, 1924, Isaac Untermyer made *inter vivos* a gift to his son, Edward D. Untermyer, of 5,000 shares of the capital stock of the Kennecott Copper Corporation, which, as of the date of the gift, had a fair market value

of $192,500, and that thereupon a tax was imposed on the testator upon the value of the property which was the subject of such gift, pursuant to the provisions of Sections 319 to 324 of the Act of Congress of June 2, 1924, which tax was paid under protest; whereupon the testator filed with the respondent a claim for the refund of such tax payment, and on or about August 3, 1925, the Commissioner of Internal Revenue of the Treasury Department rejected said claim.

SEVENTH: A certified transcript of the record of the case accompanies this petition.

EIGHTH: Your petitioners are advised by their counsel and believe that this case presents the following questions which, because of their great importance, should be passed upon by this Court:

1. Whether the provisions of Sections 319, 320 *et seq.* of the Revenue Act of 1924 imposing a tax on gifts are unconstitutional as violative of the Fifth Amendment of the Constitution of the United States, because

(a) they deprived the plaintiffs' testator of his property, without due process of law;

(b) they deprived the plaintiffs' testator of the liberty of disposing of his property, without due process of law;

(c) they deprived the plaintiffs' testator of one of the essential attributes of his property—the right to dispose of it in accordance with his own free will and unhampered by the imposition of a tax on the exercise of that right;

(d) they were in legal effect the equivalent of a prohibition against the making of a gift and

an impairment of the right of disposition by gift, by reason of the imposition of restrictive conditions upon the exercise of such right;

(e) the tax imposed upon plaintiffs' testator was in effect one upon the exercise of a fundamental right incident to the ownership of property, namely, the right to make a gift, the exercise of such right not being a privilege derived from any statutory authority or governmental license or consent; and

(f) the tax imposed because of the making of the gift is not predicated upon a valid exercise of the taxing power vested in Congress, the imposition of such a tax being *pro tanto* an act of confiscation of the testator's property.

2. Whether the provisions of Sections 319, 320 *et seq.* of the Revenue Act of 1924 imposing a tax on gifts are null and void on the ground that the imposition of such a tax constitutes a violation of the Fifth Amendment of the Constitution of the United States, in that Congress did not have the right, power or authority to levy or assess any tax upon an executed gift made *inter vivos*, and the gift here in question was concededly such a gift, and not a gift *causa mortis*.

3. Whether the provisions of Sections 319, 320 *et seq.* of the Revenue Act of 1924 imposing a tax on gifts constituted a direct tax which was not laid in proportion to a census and enumeration, as required by Article I, Section 9, subdivision 4, of the Constitution of the United States.

4. Whether the provisions of Sections 319, 320 *et seq.* of the Revenue Act of 1924 imposing a tax on gifts were or were not legally retroactive so as to apply to a gift which the plaintiffs' testator had made prior to the passage of the Act.

NINTH: Your petitioners are advised that two cases are now pending in this Honorable Court which involve questions similar to those above set forth as involved herein, viz., *McNeir* v. *Anderson,* which is No. 966 on the docket of the present term, in which a writ of certiorari has been recently allowed, and *Blodgett* v. *Holden,* which is No. 779 on the docket of the present term, in which questions have been certified for decision by the Circuit Court of Appeals for the Sixth Circuit and which has recently been advanced for argument at the beginning of the October, 1927, term of this Court. It is desirable that this case be reviewed by this Honorable Court in conjunction with and at the same time as the *McNeir* and *Blodgett* cases, especially since the petitioners are advised by their counsel that this case more fully raises the questions arising under the Fifth Amendment to the Constitution of the United States than do either of the two cases now pending in this Court.

TENTH: In support of their contentions, the petitioners refer to the annexed brief, which is made a part hereof.

WHEREFORE, your petitioners pray that a writ of certiorari may issue out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Second Circuit, commanding said Court to certify to this Court for review and determination, as provided in the Act of Congress known as the Judicial Code, and that your petitioners have such further relief

in the premises as to this Court may seem appropriate and in conformity with said Act.

And your petitioners will ever pray, etc.

Dated, April 14, 1927.

FANNIE E. UNTERMYER, as Executrix
and
EDWARD D. UNTERMYER, as Executor
under the Last Will and Testament
of Isaac Untermyer, deceased,

by LOUIS MARSHALL,
their Solicitor and Counsel.

LOUIS MARSHALL,
Solicitor and Counsel for Petitioners,
120 Broadway,
New York, N. Y.

UNITED STATES OF AMERICA,
SOUTHERN DISTRICT OF NEW YORK,
STATE OF NEW YORK,
COUNTY OF NEW YORK, } ss.:

LOUIS MARSHALL, being duly sworn, says:

I am solicitor and counsel for Fannie E. Untermyer as Executrix and Edward D. Untermyer as Executor under the Last Will and Testament of Isaac Untermyer, deceased, the above-named petitioners. I have read over the foregoing petition and know the contents thereof and the facts as stated therein are true to the best of my knowledge, information and belief.

LOUIS MARSHALL.

Subscribed and sworn to before me
this 14th day of April, 1927.

RAPHAEL BRILL,
Notary Public No. 324,
New York County.
(Seal) Commission expires Mar. 30, 1928.

Certificate of Counsel.

I HEREBY CERTIFY that in my opinion the foregoing petition for a writ of certiorari is well founded in law.

LOUIS MARSHALL,
Solicitor and Counsel for Petitioners.

Supreme Court of the United States

OCTOBER TERM, 1926.

No.

FANNIE E. UNTERMYER as Executrix and EDWARD D. UNTERMYER as Executor of the Last Will and Testament of Isaac Untermyer, deceased,

Petitioners,

against

CHARLES W. ANDERSON, as Collector of Internal Revenue of the United States of America for the Third District of New York,

Respondent.

PETITIONERS' BRIEF.

As appears from the petition, this case involves the validity of the provisions of the Revenue Act of 1924 relating to a tax on gifts.

The Circuit Court of Appeals for the Sixth Circuit has certified questions concerning certain phases of the unconstitutionality of the Act in *Blodgett* v. *Holden,* which

is No. 779 upon the docket of the present term, and that case has been advanced for argument at the beginning of the October, 1927, term.

A writ of certiorari has also been granted in *McNeir* v. *Anderson*, No. 966 on the docket of the present term.

In both of those cases emphasis has been laid on the theory that this is a direct tax which has not been laid in compliance with the requirements of Article I, Section 9, subdivision (4), of the Constitution of the United States. It is also contended in both cases that the Act of 1924 is not retroactive.

Both of these propositions are also presented by the record in this case. We, however, place special emphasis upon the contention that this tax constitutes a violation of the due process clause of the Fifth Amendment to the Constitution of the United States. While that objection was suggested in *McNeir* v. *Anderson* and was passed upon by the Circuit Court of Appeals for the Second Circuit, it has been treated as of secondary importance. We, however, regard it as the primary objection to the validity of this legislation, although we likewise recognize the merit of the objections presented in both of the cases referred to now pending in this Court.

POINTS.

I.

For the reasons which led to the granting of a writ of certiorari in *McNeir* v. *Anderson*, we urge that a similar writ be granted in the present case.

II.

The gift tax constitutes a deprivation of liberty and property without due process of law in violation of the inhibition of the Fifth Amendment to the Constitution of the United States. This tax relates solely to a gift *inter vivos*, and is imposed solely upon the donor.

The concept of property relates, in a legal sense, not so much to the physical thing itself which is the subject-matter of ownership, as it does to its attributes and to certain rights of the owner in and over the thing itself. They are (1) the right of possession, (2) the right of use and enjoyment, (3) the right of excluding others from such use and enjoyment, and (4) the right to sell or otherwise dispose of it according to the will of the owner.

1 Bl. Comm. 138.

Dickson v. *People*, 168 Ill. 179, 180, 48 N. E. Rep. 108, 39 L. R. A. 116.

Grand Rapids Booming Co. v. *Jarvis*, 30 Mich. 308, 321.

Chicago etc. R. Co. v. *Englewood Connecting R. Co.*, 115 Ill. 375, 385.

Wynehamer v. *People*, 13 N. Y. 378, 379.

Sherman v. *Elder*, 24 N. Y. 381, 384.

People ex rel. Manhattan Savings Inst. v. *Otis*, 90 N. Y. 48, 52.

Janes v. *Omaha Street R. Co.*, 53 Neb. 631, 653.
Eastern v. *Boston etc. R. R. Co.*, 51 N. H. 504, 511.
Smith v. *Campbell*, 10 N. C. 595, 597.

It was certainly beyond the constitutional power of Congress to enact a law which would interfere with any of these attributes of property. Consequently, a statute forbidding the owner of property to make a gift of it would be a nullity. So, likewise, would be an act which would hamper the right of disposition by imposing conditions which would impair such right of disposition, as, for example, a law which would prohibit the owner of property from giving away more than one-half or one-fourth of his property. In like manner, it is our contention that an act which would impose as a condition to the making of a gift or penalize such gift by exacting the payment of a tax, would likewise deprive an owner of property of one of its essential attributes without due process of law.

If, for example, a tax were imposed upon a gift to the extent of 5 per cent. of its substance, it would by the same token justify the exaction by further legislation of 50 per cent. upon the amount of the gift. What, then, would become of the right of disposition? Who would set the limits on the amount that may be taken? There is no express power conferred upon Congress to impose such a tax, nor is there any accepted principle in the law of taxation which would confer upon the law-making power the right to lay such a tax upon the act of giving. So far as we are informed, there is no precedent for such a tax; certainly not for the creation of such a tax by Congress.

Before the moment of making the gift, Congress could not have imposed a tax upon the property which was the subject of the gift. Upon what theory, then, has the status

of the property changed or the right of the owner been altered by the mere fact that he is giving the property to the persons whom he has selected as its recipients by way of a gift *inter vivos?* In making the gift the donor is merely exercising one of his fundamental rights. He is not deriving any privilege from any Act of Congress or from any ordinance or governmental permission to make the gift. He is not acting pursuant to any license; nor is he holding his property by virtue of any governmental sanction nor because he is carrying on any business or occupation under its authority; nor is it necessary for him to secure governmental consent to the act of giving.

In this respect there is a wide distinction between an inheritance and a gift. At common law the State might have intervened upon the death of the owner of property and taken it for its own purposes. The right, therefore, to acquire the property of a dead man, either under his will or under the Statutes of Distribution or Descent, is a matter of grace. Moreover, the title of the property is, in such cases, ordinarily transferred through the aid of the courts, and is thus dependent upon governmental sanction. This is clearly brought out in the opinions in *Knowlton* v. *Moore*, 178 U. S. 41, and *Blackstone* v. *Miller*, 188 U. S. 189, 205. It follows that, in such a case, the Government, having the inherent power to take all of the decedent's property upon his death, may take any part of it in the form of death duties or inheritance taxes. None of those considerations are applicable to gifts *inter vivos*.

Under the Federal Income and Estate Tax Laws, beginning with the Act of 1913 and repeated in the Acts of 1916, 1917, 1918, 1921 and 1924, it is provided that the value of property acquired by gift, bequest, devise or descent shall be exempt from taxation as income, so far as the donee is concerned. Under the Inheritance Tax Law, Section 202b of the Act of 1916, Section 402c of the Acts of

1919 and 1921, and Section 302c of the Act of 1924, there is to be included in the estate of a decedent, for purposes of taxation, the value at the time of his death of any interest of which he has made a transfer or with respect to which he has created a trust in contemplation of or intended to take effect in possession or enjoyment at or after his death. In that connection, however, it was provided that a final distribution of property made by a decedent within two years prior to his death, without consideration, unless the contrary be shown, is to be deemed to have been made in contemplation of death within the meaning of the statute. This provision carried out the legislative policy with regard to attempts that might be made to evade the object of the Estate Tax Law.

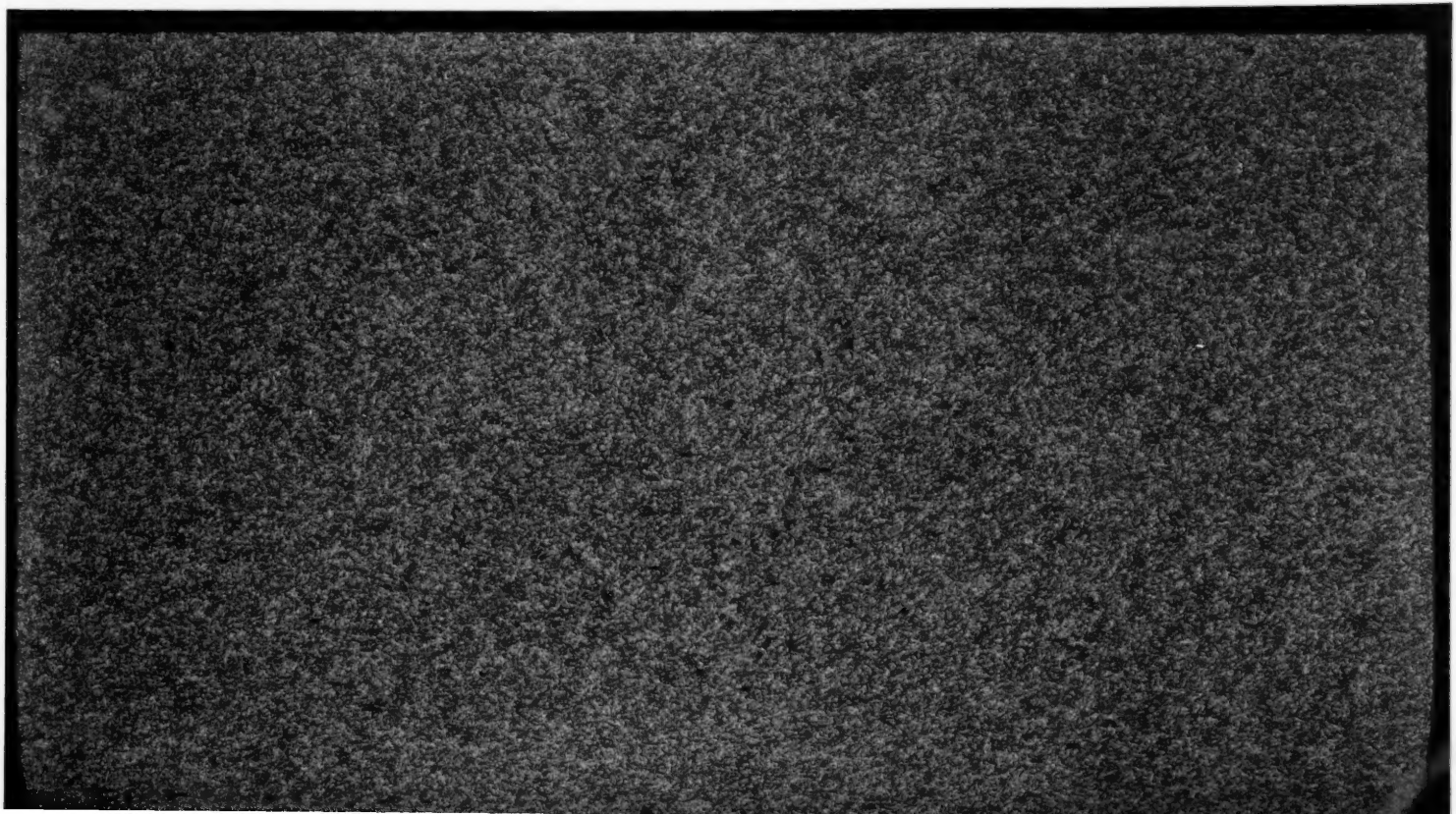
In respect to the Gift Tax Act of 1924, however, there is nothing which indicates the statute to have any relevancy to the prevention of the evasion of an inheritance tax, because ample provision was made in the sections just discussed to prevent such evasion. There is nothing in the Gift Tax Law of 1924 which in any way conveys the thought that it is intended to secure the collection of an inheritance tax. *It is not directed against the donee, but solely against the donor. It relates to any gift, however remote in time from the ultimate death of the donor.* As a tax, therefore, it is the very converse of an inheritance or estate tax.

That there are limits to the power of taxation has been clearly established in the *Child Labor Tax Case,* 259 U. S. 20, and in *Hill* v. *Wallace,* 259 U. S. 44.

III.

In view of the importance of the constitutional question sought to be presented, it is respectfully prayed that the petition for a writ of certiorari be granted.

LOUIS MARSHALL,
Petitioners' Counsel.





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Supreme Court of the United States

OCTOBER TERM, 1927.

FANNIE E. UNTERMYER, as Executrix, and EDWARD D. UNTERMYER, as Executor of Isaac Untermyer, deceased, Petitioners,

against

CHARLES W. ANDERSON, as Collector of Internal Revenue for the Third Collection District of New York.

No. 221.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR PETITIONERS.

The action was brought by the testator, Isaac Untermyer, in his lifetime to recover from the Collector of Internal Revenue the sum of $2,782.86 with interest from April 1, 1925, the amount collected under protest as a tax on gifts made by the testator on May 23, 1924, to the amount of $193,100, it being contended that the gift tax was unconstitutional for reasons stated, and that in any event no tax was assessable upon the gifts made by the plaintiff prior to June 2, 1924 (*Rec., pp.* 2-5).

The case was tried before Honorable Francis A. Winslow, United States District Judge, and a jury on March 8, 1927, on an agreed state of facts (*Rec., pp.* 14-16), among which is the following:

> "Eighth. That the gift made by plaintiffs' testator upon which the tax herein referred to was imposed was made on the 23rd day of May, 1924."

The petitioners' counsel then moved for the direction of a verdict for the plaintiffs on the various grounds set forth on pages 19-20 of the record, including the following:

> "(9) That the provisions of Sections 319, 320, et seq. of the Revenue Act of June 2, 1924, did not apply to the gift made by the plaintiffs' testator on May 23, 1924, and that the terms of the said statutes were not retroactive."

The motion for the direction of a verdict was denied and the ruling was duly excepted to.

Thereupon the defendant's counsel moved for the direction of a verdict in favor of the defendant for a dismissal of the complaint on the authority of *Anderson, Collector,* v. *McNeir,* 16 Fed. (2nd) 970. This motion was granted, and the plaintiffs' counsel duly excepted (*Rec., p.* 20).

A writ of error was thereupon sued out to the United States Circuit Court of Appeals for the Second Circuit, where the judgment was affirmed, and thereafter a petition for a writ of certiorari was granted by this Court on May 2, 1927.

The record presents the following

Assignments of Error:

FIRST. In that the District Court erred in refusing to hold that the provisions of Sections 319, 320, *et seq.*, of the Revenue Act of 1924, imposing a tax on gifts, are null and void, on the ground that the imposition of such a tax constitutes a violation of the provision contained in the Fifth Amendment to the Constitution of the United States, in that it deprived the donor of property without due process of law.

SECOND. In that the District Court erred in refusing to hold that the provisions of Sections 319, 320, *et seq.*, of the Revenue Act of 1924, imposing a tax on gifts, are null and void, on the ground that the imposition of such a tax constitutes a violation of the provisions contained in the Fifth Amendment to the Constitution of the United States, in that it deprived the donor of the liberty of disposing of his property without due process of law.

THIRD. In that the District Court erred in refusing to hold the provisions of Sections 319, 320, *et seq.*, of the Revenue Act of 1924, imposing a tax on gifts, null and void, on the ground that the imposition of such a tax constitutes a violation of the provision contained in the Fifth Amendment to the Constitution of the United States, in that it deprived the donor of one of the essential attributes of the property which was the subject of the gift on which a tax has been levied, namely, the right to dispose of it in accordance with his own free will and unhampered by the imposition of a tax on the exercise of that right.

FOURTH. In that the District Court erred in refusing to hold that the provisions of Sections 319, 320, *et seq.*,

of the Revenue Act of 1924, imposing a tax on gifts, are null and void, on the ground that the imposition of such a tax constitutes a violation of the provision contained in the Fifth Amendment to the Constitution of the United States, in that the provisions of the Revenue Law imposing a gift tax are in legal effect the equivalent of a prohibition against the making of a gift, and constitute an impairment of the right of disposition by imposing restrictive conditions upon the exercise of such right.

FIFTH. In that the District Court erred in refusing to hold that the provisions of Sections 319, 320, *et seq.*, of the Revenue Act of 1924, imposing a tax on gifts, are null and void, on the ground that the imposition of such a tax constitutes a violation of the provision contained in the Fifth Amendment to the Constitution of the United States, in that the tax upon the donor is in effect one upon the exercise of one of the fundamental rights incident to the ownership of property, the tax being imposed upon the donor in connection with the exercise of that right and his exercise of such right not being a privilege derived from any statutory authority or governmental license or consent.

SIXTH. In that the District Court erred in refusing to hold that the provisions of Sections 319, 320, *et seq.*, of the Revenue Act of 1924, imposing a tax upon gifts, are null and void, on the ground that the imposition of such a tax constitutes a violation of the provision contained in the Fifth Amendment to the Constitution of the United States, in that the tax imposed upon the donor because of the making of the gift is not predicable upon a valid exercise of the taxing power vested in Congress and the imposition of such a tax is in the nature of an act of confiscation.

SEVENTH. In that the District Court erred in refusing to hold that the provisions of Sections 319, 320, *et seq.*, of the Revenue Act of 1924, imposing a tax on gifts, are null and void, on the ground that the tax imposed is neither an income tax, an excise tax, a death duty, an estate or succession tax, nor an impost tax, authorized by the Constitution of the United States, but constitutes a direct tax not laid or imposed in proportion to the census and an enumeration directed to be taken pursuant to the Constitution of the United States, and is violative of Article I, Section 9, subdivision 4, of the Constitution of the United States.

EIGHTH. In that the District Court erred in refusing to hold that the provisions of Sections 319, 320, *et seq.*, of the Revenue Act of 1924, imposing a tax on gifts, are null and void, on the ground that the imposition of such a tax constitutes a violation of the provisions contained in the Fifth Amendment to the Constitution of the United States, in that Congress did not have the right, power or authority under the Constitution of the United States to levy or assess any tax upon executed gifts made *inter vivos*, and the gift here in question was concededly such a gift and not a gift *causa mortis*.

NINTH. In that the provisions of Sections 319, 320 *et seq.*, of the Revenue Act of 1924 did not apply to the gift made by the plaintiffs' testator on May 23, 1924, and that the terms of the said statute were not retroactive.

TENTH. In that the District Court erred in refusing to direct the jury to render a verdict herein in favor of the plaintiffs and against the defendant on the grounds specified in the motion made by plaintiffs on the trial hereof.

ELEVENTH. In that the District Court erred in directing a verdict in favor of the defendant herein and for dismissal of the complaint (*Rec., pp.* 23 *to* 26).

POINTS.

I.

A gift made during the calendar year 1924 and prior to June 2, 1924, the date when the Revenue Act of 1924 became a law, was not made taxable by that Act; but if intended that it should be, the Act, in so far as it related to a gift so made, was void because in violation of the Fifth Amendment to the Constitution of the United States.

By Section 319 of the Revenue Act of 1924, which was approved and became a law on June 2, 1924, it is provided that "for the calendar year 1924 and each calendar year thereafter, a tax equal to the sum of the following is hereby imposed upon the transfer by a resident by gift during such calendar year of any property wherever situated, whether made directly or indirectly * * * 1 per centum of the amount of the taxable gifts not in excess of $50,000 * * *."

By the Act of February 26, 1926 (44 Stat. 86, Chap. 27), Section 319 of the Revenue Act of 1924 was amended by subdivision (a) of Section 324 of the Act merely in respect to percentages by which the tax was to be computed, and by subdivision (b) it was expressly provided: "(b) Subdivision (a) of this section shall take effect as of June 2, 1924."

The Decision in Blodgett v. Holden.

It is believed that the decision rendered by this Court on November 21, 1927, in *Blodgett* v. *Holden,* 48 S. C. Rep. 105, has determined that a gift made prior to June 2, 1924, was not made taxable.

On January 3, 1928, this Court, in *McNeir* v. *Anderson,* on confession of error by the Attorney General, reversed the decision in *Anderson* v. *McNeir,* 16 Fed. (2nd) 970, on the authority of *Blodgett* v. *Holden.*

The Attorney General has, however, concluded that this case should be argued, because the gift in question was made subsequent to the presentation for the consideration of Congress of the gift tax provisions in the Revenue Act of 1924, that date being "not prior to February 25th of that year" and the gifts involved in *Blodgett* v. *Holden* and in *McNeir* v. *Anderson* having been made in January, 1924.

This amounts to saying that, although the statute does not refer to the taxation of any gift made on or before February 25, 1924, it has retroactive effect on a gift made after February 25, 1924, because on that day the attention of Congress was for the first time directed to the taxation of such gifts.

In view of the fact that the gifts in the present case were made prior to June 2, 1924, we contend, on the reasoning of this Court in *Blodgett* v. *Holden,* that under the decision there rendered the gift involved in the present case was not taxable.

Blodgett v. *Holden* came before this Court on the certification by the Circuit Court of Appeals for the Sixth Circuit of three questions, the only one answered being:

> "Are the provisions of Sections 319-324 of the Revenue Act of 1924 * * * unconstitutional in so far as they impose and levy a tax upon transfers of property by gifts *inter vivos,* not made in contemplation of death, *and made prior to June 2, 1924, on which date the Act was approved,* because the same is a direct tax and unapportioned, or because it takes property without due process, or for public use without just compensation, in violation of the Fifth Amendment?"

The concluding paragraphs of the opinion of Mr. Justice McReynolds read:

> "Determination of the cause does not require us to consider other objections to the statute which have been advanced. And it is unnecessary to express an opinion concerning the validity of the statute as to transfers subsequent to June 2. Here, all such gifts were within the exemption granted.
>
> So far as the Revenue Act of 1924 undertakes to impose a tax because of the gifts made during January, 1924, it is arbitrary and invalid under the due process clause of the Fifth Amendment. And the question is so answered."

The opinion of Mr. Justice Holmes, in which Justices Brandeis, Sanford and Stone concurred, concludes with the paragraph:

> "On the general question whether there is power to tax gifts I express no opinion now. I agree with the result that the plaintiff is entitled to recover the taxes paid in respect of gifts made before the statute went into effect."

It would seem that there is no real difference, so far as this legislation is concerned, between a gift made in January or February, and one made in May, 1924, since all of them were made before June 2, 1924, when the Revenue Act was approved and went into effect. Until then there was not and never had been any law relating to the taxation of gifts *inter vivos*. The Act spoke as of the time of its approval. It contained no retroactive provision. The mere presentation for consideration by Congress, or by any Legislature, of a bill, is not the equivalent of legislation. Thousands of bills are introduced annually which never become laws; thousands are amended materially after their introduction. In many instances one House may adopt and the other reject proposed legisla-

tion. It also frequently occurs that a bill never assumes its final form until a few days before its passage by Congress; so that nobody can say until actual passage just what, if anything, the legislation will be. The President or Governor whose approval is necessary to the completion of the legislative process, often withholds his approval or induces the recall of the bill for further amendment. It is a significant fact that when President Coolidge signed the Revenue Act of 1924, he took pains to make the precautionary statement:

> *"A gift tax is a further invasion of the rights of the citizen, both unusual in nature and of doubtful legality."*

To apply any other rule of retroactivity, in the absence of express terms in the statute indicating a contrary purpose, than that the dividing line shall be the date when the statute was approved, would introduce confusion and complication, as well as injustice. It would impose upon the citizen the onerous obligation not only of knowing what the law is after the legislative body has spoken and its action has been approved by the executive, but also to know what occurs from day to day, while a bill is undergoing consideration, for the purpose of speculating as to whether or not the bill will ever ripen into legislation. So far as known, there is no precedent which would justify the distinction which the Attorney General is seeking to make between this case and *Blodgett* v. *Holden* and *McNeir* v. *Anderson.*

Treating the Case Regardless of Blodgett v. Holden.

But considering the entire question *de novo,* we contend that the statute is not applicable to any gift made prior to June 2, 1924.

There is nothing in the language of the Act which expressly declares that a gift made prior to June 2, 1924, is intended to be taxed. It is not provided that the tax is

imposed on *all* gifts made during the calendar year. The language adopted is fully satisfied when applied to gifts made during the calendar year subsequent to the date of the passage of the Act. If the purpose of the legislators had been otherwise, they would have referred to the gift as one made either before or after the passage of the Act. The failure to do so gives rise to the presumption that the legislation was intended to be prospective, and not retrospective, in its operation. This is especially true of a law imposing taxation, in regard to which it has been frequently declared that such an Act is not to be extended by implication, and that any doubt as to its operation is to be resolved in favor of the taxpayer.

The terms of the amendment of 1926 gives emphasis to this proposition.

The recent authorities speak with one voice on this subject.

In *Shwab* v. *Doyle,* 258 U. S. 529, the Court was called upon to determine as to the retroactivity of the Revenue Act of 1916, which imposed a tax upon the transfer of the net estate of every decedent dying after its passage, "to the extent of any interest therein of which the decedent has at any time made a transfer or with respect to which he has consummated a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death." It was held that the Act was not intended to apply to transactions consummated before its passage, and this ruling was made notwithstanding the fact that the statute further declared that "any transfer of a material part of his property in the nature of a final disposition or distribution thereof made by the decedent *within two years prior to his death* with such a consideration [referring to a fair consideration in money or money's worth], shall, unless shown to the contrary, be deemed to have been made in contemplation of death."

It was further held that the re-enactment of this provision, with the added provision that the transfer or trust should be taxed whether made before or after the passage of the Act, was not a construction of the earlier Act as being retroactive, but was the expression of a new purpose.

In the opinion delivered by Mr. Justice McKenna we read (pp. 534-535):

> "The initial admonition is that laws are not to be considered as applying to cases which arose before their passage unless that intention be clearly declared. 1 Kent, 455; Eidman v. Martinez, 184 U. S. 545; Gould v. Gould, 245 U. S. 151; Story, Const., § 1398. The comment of Story is, 'retrospective laws are, indeed, generally unjust; and, as has been forcibly said, neither accord with sound legislation nor with the fundamental principles of the social compact.' There is absolute prohibition against them when their purpose is punitive; they being then denominated *ex post facto laws.* It is the sense of the situation that that which impels prohibition in such case exacts clearness of declaration when burdens are imposed upon completed and remote transactions, or consequences given to them of which there could have been no foresight or contemplation when they were designed and consummated. The Act of September 8, 1916, is within the condemnation. There is certainly in it no declaration of retroactivity, 'clear, strong and imperative,' which is the condition expressed in United States v. Heth, 3 Cranch, 398, 413; also United States v. Burr, 159 U. S. 78, 82-83. If the absence of such determining declaration gives to the statute a double sense, it is the command of the cases that that which rejects retroactive operation must be selected."

See also:

Union Trust Co. v. *Wardell,* 258 U. S. 537.
Levy v. *Wardell,* 258 U. S. 542.
Knox v. *McElligott,* 258 U. S. 546.
Reynolds v. *McArthur,* 2 Pet. 417, 434.

Similar in principle are *United States* v. *Field,* 255 U. S. 257, and *Smietanka* v. *First Trust & Savings Bank,* 257 U. S. 602.

Llewellyn v. *Frick,* 268 U. S. 238, arose under the Revenue Act of February 24, 1919, which purported to include policies insuring the life of a decedent in the gross value of his estate as a basis for fixing the transfer tax thereon, though the policies be payable to beneficiaries other than the estate, and which allowed the executor to recover from such beneficiaries their proportions of such tax and make them personally responsible therefor if not paid when due. This provision was construed as inapplicable to transactions antedating the passage of the Act. While the Court refrained from discussing the limits of the power of Congress in such case, Mr. Justice Holmes said:

> "Acts of Congress are to be construed if possible in such a way as to avoid grave doubts of this kind. Panama R. R. Co. v. Johnson, 264 U. S. 375, 390. Not only are such doubts avoided by construing the statute as referring only to transactions taking place after it was passed, but the general principle 'that the laws are not to be considered as applying to cases which arose before their passage' is preserved, when to disregard it would be to impose an unexpected liability that if known might have induced those concerned to avoid it and to use their money in other ways."

It was also held that a declaration in a subsequent Act dealing with the same subject, that a provision contained in it shall be retroactive, helps the conclusion that the same provision in an earlier Act lacking such declaration was not retroactive.

It may be added that according to this persuasive process of reasoning the same result would follow from the fact that, prior to the passage of the Act now under consideration, Congress had in the Revenue Act expressly declared a purpose to make other cognate provisions applicable to transactions completed before such enactment. This is especially important when one considers that in the Act now under review, Congress, with presumptive knowledge of these statutory precedents, and of the decisions above cited, had deliberately refrained from making a similar declaration of intention.

In the case now before the Court, the gifts sought to be taxed had been executed prior to the passage of the Revenue Act of 1924. They were not gifts *causa mortis*, but *inter vivos*. There is no pretense that they in any way were made in contemplation of death or for the purpose of evading the provisions of law taxing inheritances. The gifts were in every way lawful and made in the exercise of a constitutional right. The fact that they were consummated but a short time prior to the passage of the law does not affect the constitutional question, there being no claim of bad faith. The situation is, therefore, the same as it would have been had the gifts been made one, five, or ten years prior to this enactment. The fact that the rate of the tax is comparatively small as affecting most donors does not subject it to any different rule than would obtain if it were attempted by a law passed in 1927 to tax at the rate of 50 per cent. every gift *inter vivos* made in ordinary course since the beginning of the century.

Were this Act, however, to be interpreted as retrospective in its operation, it would be of so arbitrary a character as to offend against the Fifth Amendment to the Constitution of the United States.

This is believed to be the effect of the ruling in *Nichols* v. *Coolidge,* 47 Sup. Ct. Rep. 710, decided May 31, 1927. There it was held that Section 402c of the Revenue Act of 1918, if construed as requiring a tax on the value of property transferred by decedent prior to its passage in entire good faith and without contemplation of death, merely because the conveyance was intended to take effect in possession at or after death, was so arbitrary as to amount to confiscation, and thus contrary to the protection afforded by the Fifth Amendment. Mr. Justice McReynolds said:

> "Under the theory advanced for the United States, the arbitrary, whimsical and burdensome character of the challenged tax is plain enough. An excise is prescribed, but the amount of it is made to depend upon past lawful transactions, not testamentary in character and beyond recall."

See also

Blodgett v. *Holden,* 48 Sup. Ct. Rep. 105.

II.

Section 319 of the Revenue Act of 1924 violates the Fifth Amendment to the Constitution of the United States, in that it deprives the donor of the gift sought to be taxed of his property without due process of law.

At the time when the gift was made, the donor had the absolute right to deal with the subject-matter of the gift, whether it consisted of realty, chattels, money, or things in action, as he saw fit. It was his property, and one of its incidents, which was in itself a property right, was the power to sell it or to give it away. A law which undertook to prohibit such a right of disposition was in effect confiscatory in its operation. If the law did not go so far as absolutely to prohibit such disposition, but imposed upon the exercise of the power a tax, it would have been *pro tanto* an invasion of the owner's property right, and particularly so if, as respondent contends, the taxing law were enacted subsequent to a transfer made of the property, and retroactive in scope.

It is scarcely necessary to cite many authorities in support of this fundamental principle. The doctrine is compactly stated in Baldwin's Century Edition of *Bouvier's Law Dictionary* (1926) under the title "Property," page 995:

> "When things are fully our own, or when all others are excluded from meddling with them or from interfering about them, it is plain that no person besides the proprietor, who has this exclusive right, can have any claim either to use them, or to hinder him from disposing of them as he pleases; so that property, considered as an exclusive right to things, contains not only a right to use

those things, but a right to dispose of them, either by exchanging them for other things, or by giving them away to any other person without any consideration, or even throwing them away. Rutherforth, Inst. 20; Domat, liv. prel. tit. 3; Pothier, *des choses;* 18 Viner, Abr. 63; Com. Dig. *Biens.* See, also, 2 B. & C. 281; 9 id. 396; 3 Dowl. & R. 394; 1 C. & M. 39; 4 Call 472; 18 Ves. 193; 6 Bingh. 630."

In *Wynehamer* v. *People,* 13 N. Y. 396, 397, Judge Comstock gives expression to this idea in terms that have become classic:

"Now, I can form no notion of property which does not include the essential characteristics and attributes with which it is clothed by the laws of society. In a state of nature property did not exist at all. 'Every man might then take to his use what he pleased, and retain it if he had sufficient power; but when men entered into society and industry, arts and sciences were introduced, property was gained by various means, for the securing whereof proper laws were ordained.' (Tomlin's Law Dic., Property; 2 Bl. Com. 34.) Material objects, therefore, are property in the true sense, because they are impressed by the laws and usages of society with certain qualities, among which are, fundamentally, the right of the occupant or owner to use and enjoy them exclusively, and his absolute power to sell and dispose of them; and as property consists in the artificial impression of these qualities upon material things, so, whatever removes the impression destroys the notion of property, although the things themselves may remain physically untouched.

Nor can I find any definition of property which does not include the power of disposition and sale, as well as the right of private use and enjoyment. Thus Blackstone says (1 Com. 138): 'The third absolute right of every Englishman is, that of property, which consists in the free use, enjoyment and *disposal* of all his acquisitions, without any control

> or diminution, save only by the laws of the land.' Chancellor Kent says (2 Kent's Com. 320): 'The exclusive right of using and *transferring* property follows as a natural consequence from the perception and admission of the right itself.' And again (p. 326): 'The power of *alienation of property* is a necessary incident to the right, and was dictated by mutual convenience and mutual wants.' * * * These definitions are in accordance with the general sense of mankind. Indeed, if any one can define property eliminated of its attributes, incapable of sale and placed without the protection of law, it were well that the attempt should be made."

In *Sherman* v. *Elder,* 24 N. Y. 381, 384, Judge Allen said:

> "Property considered as an exclusive right to things contains not only a right to use them but a right to dispose of them either by exchanging them for other things or by giving them away to any other person without any consideration, or even throwing them away."

In *People* v. *Otis,* 90 N. Y. 52, Chief Judge Andrews said:

> "Depriving an owner of property of one of its essential attributes, is depriving him of his property within the constitutional provision."

In *Chicago & Western Indiana R. R. Co.* v. *Englewood Connecting Rwy. Co.* (1886), 115 Ill. Rep. 375, 385, the Court said:

> "* * * for property itself, in a legal sense, is nothing more than the exclusive right 'of possessing, enjoying and disposing of a thing,' which, of course, includes the use of a thing."

In *Jaynes* v. *Omaha Street R. Co.* (1898), 53 Neb. 631, 653:

> "* * * 'Property' in its appropriate sense means that dominion or indefinite right of user and disposition which one may lawfully exercise over particular things or objects, and generally to the exclusion of all others, and doubtless this is substantially the sense in which the word is used in the constitution, as to the taking or damaging of private property for the public use."

In *Smith* v. *Campbell* (1825), 10 N. C. 595, 597:

> "Property is a thing over which a man may have dominion and power to do with it as he pleases, so that he violates not the law. He may give, grant, or sell it at his pleasure."

In *Eaton* v. *B. C. & M. R. R.* (1872), 51 N. H. 504, 511:

> "The term 'property,' although in common parlance frequently applied to a tract of land or a chattel, in its legal signification 'means only the rights of the owner in relation to it.' 'It denotes a right * * * over a determinate thing.' 'Property is the right of any person to possess, use, enjoy, and dispose of a thing.' Selden, J., in *Wynehamer* v. *The People*, 13 N. Y. 378, p. 433; 1 Blackstone Com. 138; 2 Austin on Jurisprudence, 3d ed., 817, 818. If property in land consists in certain essential rights, and a physical interference with the land substantially subverts one of those rights, such interference 'takes,' *pro tanto*, the owner's 'property.' The right of indefinite user (or of using indefinitely) is an essential quality or attribute of absolute property, without which absolute property can have no legal existence. 'Use is the real side of property.' This right of user necessarily includes the right and power of excluding others from using the land. See 2 Austin on Jurisprudence, 3d ed., 836; Wells, J., in *Walker* v. *O. C. W. R. R.*, 103

> Mass. 10, p. 14. From the very nature of these rights of user and of exclusion, it is evident that they cannot be materially abridged without, *ipso facto*, taking the owner's 'property.' "

A fortiori, any interference with a man's right to give is a taking of his property and a tax on giving is a taking of private property for public use without just compensation and without due process of law.

It was certainly beyond the constitutional power of Congress to enact a law which would interfere with any of these attributes of property involved in the cases cited. Consequently, a statute forbidding the owner of property to make a gift of it would be a nullity. So, likewise, would be an Act which would hamper the right of disposition by imposing conditions which would impair the right of disposition, as, for example, a law prohibiting the owner of property from making a gift *inter vivos of* more than one-half or one-quarter of his property while he is in a normal state of mind and is not subject to undue influence. In like manner, it is contended that a law which would exact, as a condition or as a penalty for making such gift, the payment of a tax, would likewise deprive the owner of property of one of its essential attributes without due process of law.

In *Buchanan* v. *Warley*, 245 U. S. 60, 74, Mr. Justice Day said:

> "Property is more than the mere thing which a person owns. It is elementary that it includes the right to acquire, use, and dispose of it. The Constitution protects these essential attributes of property. Holden v. Hardy, 169 U. S. 366, 391. Property consists of the free use, enjoyment, and disposal of a person's acquisitions without control or diminution save by the law of the land. 1 Blackstone's Com. (Cooley's Ed.), 127 (138)."

See also:

Dixon v. *People,* 168 Ill. 179, 180; 39 L. R. A. 116.
Grand Rapids Booming Co. v. *Jarvis,* 30 Mich. 308, 321.
Chicago etc. R. Co. v. *Englewood Connecting R. Co.,* 115 Ill. 375, 385.
Smith v. *Campbell,* 10 N. C. 595, 597.
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Eaton v. *Boston etc. R. Co.,* 51 N. H. 504, 511.
Exchange Bank v. *Hines,* 3 Ohio St. 1, 8.
Kuhn v. *Common Council,* 70 Mich. 534.

The gifts now under consideration were not in the nature of a testamentary gift, like a gift *causa mortis,* which is only to take effect in the contingency of death and is revocable at any time prior to death (*Williams* v. *Guile,* 117 N. Y. 348; *Gardiner* v. *Parker,* 3 Madd. 102; *Edwards* v. *Jones,* 1 Myl. & Craig 226). They were executed gifts *inter vivos,* not "amphibious," as a gift *causa mortis* was described by Mr. Justice Story to be (*Eq. Jur.,* Sec. 606), or ambulatory, incomplete, or revocable during the donor's lifetime—likewise characteristic of a gift *causa mortis.*

The rules which apply to a gift in contemplation of death do not, therefore, obtain in respect to a gift made without such a quasi-testamentary purpose in view.

The rules which appertain to a testamentary disposition of property, or to a right of inheritance, or to a so-called estate tax, have no relation to a gift *inter vivos* not made in contemplation of death. Such a gift does not, therefore, come within the principle of *Knowlton* v. *Moore,* 178 U. S. 41, 49, 77, which related to death duties or succession taxes. The basis of such forms of taxation is now well recognized. It is only by reason of statutory enactments that the property of a dead man can pass under

his will or by inheritance. At common law the sovereign power had the absolute right to appropriate for its own purposes the property owned by a decedent at the time of his death. The privilege of acquiring the property of a dead man, either under his will or pursuant to the Statutes of Descents or Distribution, is merely a matter of grace.

Magoun v. *Illinois Sav. & Tr. Co.*, 170 U. S. 281.
Blackstone v. *Miller*, 188 U. S. 200, 205.

The sovereign, therefore, having theoretically the right to take all of the property of the decedent, may impose an estate or succession tax or death duty upon the transfer of such property to heirs, legatees or devisees, to the extent of the full value of the property or of any amount less than such value. Moreover, it is equally well recognized that, in case of the death of the owner of property, its title is ordinarily transferable only by means of judicial action, and the transfer of title is thus, in a legal sense, dependent upon governmental sanction.

In the case of a gift *inter vivos* this theory does not apply. The sovereign's permission, consent or authority is not required for such a gift. The right to make it is free and untrammeled. The donor is merely exercising one of his fundamental property rights. In making it he is not exercising a privilege based on any statute or ordinance, or upon governmental permission or sanction of any kind. He is not acting under any license. He is not holding his property pursuant to any grace or favor of the sovereign power. Nor is the donor in making the gift carrying on any business or occupation, under authority of government, upon which a tax can be imposed.

Further viewing such a gift from the standpoint of taxation, it is to be observed that Section 319 is in no manner based upon the theory that this tax is imposed for the purpose of preventing the donor to evade the estate tax

imposed by the Revenue Act of 1924, or by any predecessor acts based upon that theory.

By subdivisions (c) and (d) of Section 302 of the Act, that contingency is fully provided for by the declaration that the value of the gross estate of the decedent shall be determined by including in the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated,

> "(c) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has at any time created a trust, *in contemplation of or intended to take effect in possession or enjoyment at or after his death*, except in case of a bona fide sale for a fair consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, *made by the decedent within two years prior to his death with such a consideration*, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of Part I of this title;
>
> (d) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has at any time created a trust, where the enjoyment thereof was *subject at the date of his death to any change through the exercise of a power, either by the decedent alone in conjunction with any person, to alter, amend, or revoke, or where the decedent relinquished any such power in contemplation of his death*, except in case of a bona fide sale for a fair consideration in money or money's worth."

If the gift was, therefore, made in contemplation of death, the subject-matter, under the conditions specified, would be treated as a part of the estate of the decedent, and, thus, taxable. The tax upon a gift *inter vivos* and

not in contemplation of death, however, does not and, as we contend, may not come within the scope of the provisions just quoted.

In *Schlesinger* v. *Wisconsin,* 270 U. S. 230, which arose under the Inheritance Tax Law of Wisconsin, this Court had occasion to consider a provision declaring that every transfer by or grant, bargain, sale or gift made within six years prior to the death of a grantor, vendor or donor of a material part of his estate, or in the nature of a final disposition or distribution thereof, and without an adequate valuable consideration, was to be construed to have been made in contemplation of death within the meaning of the statute. The State courts had enforced this statute in the face of the due process clause of the Fourteenth Amendment. The language quoted from the opinion of the Supreme Court of Wisconsin by Mr. Justice McReynolds is significant:

> " 'The tax in question is not a property tax but a tax upon the right to receive property from a decedent. It is an excise law. * * * Such [legislative] intent was to tax only gifts made in contemplation of death. That is the only class created. The legislature says that all gifts made within six years of the donor's death shall be construed to be made in contemplation of death,' [which means] 'that they shall conclusively be held to be gifts made in contemplation of death and shall fall within the one taxable class of gifts created by the legislature. * * * In our case the legislative intent we think is clear that the specified gifts were to be conclusively construed to be gifts in contemplation of death. * * * We agree with the applicants that the classification made will not support a tax as one on gifts *inter vivos* only. Under such taxation the classification is wholly arbitrary and void. We perceive no more reason why such gifts *inter vivos* should be taxed than gifts made within six years

> of marriage or any other event. It is because only one class of gifts closely connected with and a part of the inheritance tax law is created that the law becomes valid. Gifts made in contemplation of death stand in a class by themselves, and as such they are made a part of the inheritance tax law to the end that it may be effectively administred.'"

The tax imposed by Section 319 on such a gift is not payable by the donee, but by the *donor,* and is, therefore, clearly not a succession, estate or inheritance tax or a death duty, but a tax upon the exercise of the constitutional right of the donor to give away his property. It may have constituted a part or the whole of all of his belongings. To illustrate, he may have owned property valued at exactly $100,000. He may have given it to a religious or charitable institution, or to an individual. He may not have had a penny left. He was within his constitutional right in making the gift. Could he be penalized civilly or criminally because when the tax collector came around he had no property with which to meet the tax imposed by this statute?

Let us further assume that in the case now before the Court the amount of the tax claimed were to constitute 10 per cent. of the gift. If 10 per cent. may be thus exacted, by the same token the payment of 70 per cent or 90 per cent. might be exacted. What, then, would become of the right of disposition? Who would set the limit on the amounts that may be taken?

In seeking to ascertain the basis for the right of taxation upon a gift *inter vivos* not made in contemplation of death, we come to the question as to whether this tax is authorized by the Sixteenth Amendment. That, however, merely empowers Congress "to lay and collect taxes on *incomes* * * * without apportionment among the several States and without regard to any census or enumeration."

But a gift is not regarded as income under any provision of the Revenue Act. On the contrary, it is expressly excluded from the definition of that term; and so far as concerns the donor, upon whom this tax is sought to be laid, it cannot by the wildest flight of fancy be regarded as income. It does not increase, but diminishes, his property.

Nor is this tax similar to a stamp tax imposed upon the transfer of shares in a corporation. The latter is a creature of government. The transfer of its shares is necessarily made with the sanction of government. Hence the imposition of a stamp duty is based upon the idea that a privilege is conferred upon the transferor.

> *People ex rel. Hatch* v. *Reardon,* 184 N. Y. 431; aff'd 204 U. S. 152.
> *Thomas* v. *United States,* 192 U. S. 363.

Certainly Congress had no power to impose this tax upon property, because that would be a direct tax within the decision in *Pollock* v. *Farmers Loan & Trust Co.,* 157 U. S. 429, 158 U. S. 601.

Nor can it be sustained as a tax within the rule laid down in *Nicol* v. *Ames,* 173 U. S. 509, which related to a tax imposed upon the sale of property pursuant to transactions at an exchange or board of trade. There Mr. Justice Peckham, differentiating such a transaction from sales made generally, said (p. 521):

> "A tax upon the privilege of selling property at the exchange and of thus using the facilities there offered in accomplishing the sale differs radically from a tax upon every sale made in any place. The latter tax is really and practically upon property. It takes no notice of any kind of privilege or facility, and the fact of a sale is alone regarded. Although not created by government, this privilege or

> facility in effecting a sale at an exchange is so distinct and definite in its character, and constitutes so clear and plain a difference from a sale elsewhere, as to create a reasonable and substantial ground for classification and for taxation when similar sales at other places are untaxed."

It is needless to argue that such a tax as this cannot be justified by the exercise of the police power, because there is no Federal police power except to the extent conferred by the Eighteenth Amendment. The inquiry is justified as to whether or not a law which taxes the donor of food, clothing or other necessaries of life upon the amount expended for such purposes would be a valid act. If so, gifts to charity, to one's wife and children, to an educational or other philanthropic enterprise, to the community in which one lives, might likewise be made taxable. If valid, the imposition of a tax upon the donor would discourage gifts of such a character and would entail serious detriment to the public welfare. Generosity and kindliness and humane impulses would be penalized. The miser and the egoist alone would be immune.

So far as we have been able to discover, there is no precedent for such a tax as that now under consideration. Despite the frequent opportunities that have arisen to strain the ingenuity of legislators to devise new forms of taxation, it has been left to this recent period in history, when the clashing of warfare had ceased, to impose an exaction upon the maker of a gift *inter vivos,* even though the income upon the subject of the gift is taxable while in the hands of the donee; and, if a direct tax is properly apportioned, the capital of such gift may also be taxed as against the donee. It would certainly stretch the Federal taxing power far beyond the contemplation of the framers of the Constitution to add this burden to the ownership of property and thus to curtail the enjoyment of one of the most important attributes of ownership.

III.

The tax imposed by the Revenue Act of 1924 on gifts *inter vivos* is a direct tax and void because not apportioned as required by Article I, §2, clause 3 of the Constitution.

What has been said under Point II as to the character of this tax applies to the proposition now under consideration, and will not be repeated. It is believed that this tax, concededly "novel in this country" and without "historical background," is not an excise tax, as held by the Circuit Court of Appeals for the Second Circuit in *Anderson* v. *McNeir,* 16 Fed. (2nd) 970, but a direct tax on property, as ruled in that case by Judge Augustus N. Hand in the District Court, 10 Fed. (2nd) 813. The reasoning of the latter opinion, based on *Pollock* v. *Farmers' Loan & Trust Co.* (*supra*), *Nicol* v. *Ames* (*supra*), and *Dawson* v. *Kentucky Distilleries,* 255 U. S. 288, is regarded as more potent than that of the Circuit Court of Appeals.

In the case last cited it was held that a tax on the right to take possession of whiskey from a bonded warehouse, where it was required by law to be placed, was a direct tax, because possession or the right to take possession was regarded as one of the elements of property and not subject to an excise tax. Mr. Justice Brandeis said:

> "To levy a tax by reason of ownership of property is to tax the property. * * * It cannot be made an occupation or license tax by calling it so."

In *Knowlton* v. *Moore,* 178 U. S. 41, Mr. Justice White conceded that taxes "which are the essential equivalent

of a tax on property generally, real or personal, solely because of its ownership, are direct taxes."

In *Thompson* v. *Kreutzer,* 112 Miss. 165, cited in *Dawson* v. *Kentucky Distilleries Co., supra,* the Court said (p. 167):

> "*A tax on a thing is a tax on all its essential attributes, and a tax on an essential attribute of a thing is a tax on the thing itself.* * * * No definition of property can be framed which does not include the right of ownership. Consequently, no tax can be imposed on the right of ownership which is not also a tax on property."

In *Craig* v. *Taylor,* 192 Ky. 36, 39, the Court said:

> "The mere right to own and hold property cannot be made the subject of excises, since the levying of a tax by reason of ownership of property is to tax the property."

In *Thompson* v. *McLeod,* 112 Miss. 383, also cited in *Dawson* v. *Kentucky Distilleries Co., supra,* and which involved a statute taxing the extraction of turpentine from any trees in the State, the Court said (p. 388):

> "This act strikes down the inherent right of the property owner to lay hand upon his own property. Every owner of a pine tree enjoys the same natural right to extract gum from the tree as the owner of a vineyard has to pluck his own grapes. It would be the same thing to require a privilege tax as a precedent to the right of the owner to pull the ripe pecans from the pecan orchard or to enjoy a drink of pure water from the cool spring of the old homestead."

In *Pollock* v. *Farmers Loan & Trust Co.*, 157 U. S. 429, 591, Mr. Justice Field said:

> "It must be conceded that whatever affects any element that gives an article its value in the eye of the law, affects the property itself."

Mr. Chief Justice Fuller, after referring to indirect taxes, said (p. 558):

> "But a tax upon property holders in respect to their estates, whether real or personal, or of the income yielded by such estates, and the payment of which cannot be avoided, are direct taxes."

Again, at page 581, he said:

> "If it be true that by varying the form the substance may be changed, it is not easy to see that anything would remain of the limitations of the Constitution, or of the rule of taxation and representation so carefully recognized and guarded in favor of the citizens of each State. But constitutional provisions cannot be thus evaded. It is the substance and not the form which controls, as has indeed been established by repeated decisions of this Court."

On the rehearing of this case (158 U. S. 601) the Chief Justice said:

> "Whatever the speculative views of political economists or revenue reformers may be, can it be properly held that the Constitution, taken in its plain and obvious sense, and with due regard to the circumstances attending the formation of the government, authorizes a general unapportioned tax on the products of the farm and the rents of real estate, although imposed merely because of ownership and with no possible means of escape from payment, as belonging to a totally different class from that which includes the property from whence the income proceeds?

> There can be but one answer, unless the constitutional restriction is to be treated as utterly illusory and futile, and the object of its framers defeated. We find it impossible to hold that a fundamental requisition, deemed so important as to be enforced by two provisions, one affirmative and one negative, can be refined away by *forced distinctions between that which gives value to property, and the property itself.*" (Italics ours.)

See also:

Fairbank v. *United States*, 181 U. S. 283.
Nicoll v. *Ames*, 173 U. S. 509.
Weston v. *Charleston*, 2 Pet. 449.
Cook v. *Pennsylvania*, 97 U. S. 566.

It was assumed in *Blodgett* v. *Holden*, 11 Fed. (2nd) 190, that by Section 324 of the Revenue Act of 1924, which makes operative upon the tax created by Section 319 the provisions of law so far as applicable which pertain to the tax imposed by Section 301 (the estate tax), the unpaid tax becomes a lien upon the property (whether of the donor or donee is uncertain). If that were so, then the contention that the tax is a direct tax on property is strengthened.

IV.

It is respectfully submitted that the judgment of the Courts below should be reversed and the case remitted for the purpose of rendering judgment for the petitioners as prayed for in their complaint.

LOUIS MARSHALL,
Of Counsel for Petitioners.

In the Supreme Court of the United States

OCTOBER TERM, 1926

No. 1056

FANNIE E. UNTERMYER, AS EXECUTRIX, AND EDWARD D. Untermyer, as Executor, under the last will and testament of Isaac Untermyer, deceased, petitioners

v.

CHARLES W. ANDERSON, AS COLLECTOR OF INTERNAL Revenue of the United States of America for the Third District of New York

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR RESPONDENT

The Collector does not oppose the petition.

The question is as to the constitutionality of those provisions of the Revenue Act of 1924 which impose a tax on gifts. The same question is presented in No. 779, *John W. Blodgett* v. *Charles Holden, Collector of Internal Revenue,* pending before this Court on certificate from the United States Circuit Court of Appeals for the Sixth Circuit, and No. 966,

George McNeir v. *Charles W. Anderson, Collector of Internal Revenue,* pending on writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit. Under the circumstances issuing of the writ prayed for is necessary at least to preserve the rights of petitioners pending decision by this Court as to the constitutionality of the gift-tax provisions of the statute.

Respectfully submitted.

WILLIAM D. MITCHELL,
Solicitor General.

APRIL, 1927.

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In the Supreme Court of the United States

OCTOBER TERM, 1927

No. 221

FANNIE E. UNTERMYER, AS EXECUTRIX, AND EDWARD D. Untermyer, as executor, of the last will and testament of Isaac Untermyer, deceased, Petitioners

v.

CHARLES W. ANDERSON AS COLLECTOR OF INTERNAL Revenue of the United States for the Third District of New York

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT

OPINION BELOW

The case was decided in the courts below without opinion, both courts following the decision of the Circuit Court of Appeals for the same circuit in *McNeir* v. *Anderson,* rendered January 10, 1927, 16 F. (2d) 970.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered April 13, 1927. This Court granted

a writ of certiorari on May 2, 1927, pursuant to the Act of February 13, 1925. (R. 28.)

STATEMENT

The action was brought by Isaac Untermyer, to recover from the Collector of Internal Revenue the sum of $2,782.86, with interest, the amount of a tax paid under protest on gifts made by the testator on May 23, 1924, to the amount of $193,100, the tax having been assessed pursuant to the gift-tax provisions of the Revenue Act of June 2, 1924, c. 234, Sections 319–324, 43 Stat. 253, 313 (U. S. C., Title 26, Secs. 1131–1136). While the suit was pending and on August 31, 1926, Untermyer died, and thereafter it was duly revived and continued in the name of petitioner. (R 11.) The case was tried in the District Court on an agreed statement of facts. (R. 14–16.) At the conclusion of the trial both sides moved for a directed verdict, and a verdict for the defendant was directed. (R. 20.) Upon writ of error the Circuit Court of Appeals affirmed the judgment of the District Court. (R. 28.) Thereafter petition for certiorari was duly filed and granted by this Court on May 2, 1927.

THE QUESTIONS PRESENTED

The questions involved in this case are similar to those in *Blodgett* v. *Holden,* decided by this Court November 21, 1927, the difference in the facts being that the gifts considered in *Blodgett* v. *Holden* were made in January, 1924, while the gift

with which the present case is concerned was made on May 23, 1924. (R. 16.) Should this Court hold that that difference is immaterial, we assume it will reach the same conclusion as in *Blodgett* v. *Holden* and no other questions will be considered. Should the Court hold that the difference is material, then the question of the constitutionality of the gift tax law may arise for decision. The relevant portions of the Act are printed in an appendix hereto. By Section 324 of the Revenue Act of February 26, 1926, c. 27, 44 Stat. 9, 86, Section 319 of the Revenue Act of 1924, was amended merely in respect to the rate of the tax, with the provision that that section should take effect as of June 2, 1924.

ARGUMENT

I

THE CASE OF BLODGETT *v.* HOLDEN DID NOT DECIDE THAT THE GIFT TAX PROVISIONS OF THE REVENUE ACT OF 1924 WERE NOT RETROACTIVE, OR THAT ITS APPLICATION TO ALL GIFTS MADE PRIOR TO JUNE 2, 1924, WAS UNCONSTITUTIONAL

Blodgett v. *Holden* came to this Court upon certificate from the Circuit Court of Appeals for the Sixth Circuit. One of the questions certified, and the only question which this Court found it necessary to answer, was the following:

> Are the provisions of Sec. 319–324 of the Revenue Act of 1924, c. 234, 43 Stat. 313, unconstitutional insofar as they impose and

> levy a tax upon transfers of property by gifts *inter vivos,* not made in contemplation of death, and made prior to June 2, 1924, on which date the Act was approved, because the same is a direct tax and unapportioned, or because it takes property without due process, or for public use without just compensation, in violation of the Fifth Amendment?

Mr. Justice McReynolds delivered an opinion, three other Justices concurring, in which, after setting forth the question which we have quoted, the relevant provisions of the statute, and the fact that it was conceded that the transfers involved were made during the month of January, 1924, he said:

> The brief in behalf of the Collector sets out the legislative history of the gift tax provisions in the Revenue Act of 1924 and shows that they were not presented for the consideration of Congress prior to February 25 of that year. We must, therefore, determine whether Congress had power to impose a charge upon the donor because of gifts fully consummated before such provisions came before it.

The opinion then, referring to the case of *Nichols* v. *Coolidge,* 274 U. S. 531, decided May 31, 1927, holding that a tax "may be so arbitrary and capricious that its enforcement would amount to deprivation of property without due process of law within the inhibition of the Fifth Amendment," reached a conclusion expressed as follows:

> As to the gifts which Blodgett made during January, 1924, we think the challenged enactment is arbitrary and for that reason invalid. It seems wholly unreasonable that one who, in entire good faith and without the slightest premonition of such consequence, made absolute disposition of his property by gifts should thereafter be required to pay a charge for so doing.

The certified question was answered as follows:

> So far as the Revenue Act of 1924 undertakes to impose a tax because of the gifts made during January, 1924, it is arbitrary and invalid under the due process clause of the Fifth Amendment. And the question is so answered.

Eight justices sat in the case and four united in a separate opinion written by Mr. Justice Holmes. Those justices were of opinion that—

> the Act should be read as referring only to transactions taking place after it was passed, when to disregard the rule "would be to impose an unexpected liability that if known might have induced those concerned to avoid it and to use their money in other ways." *Lewellyn* v. *Frick,* 268 U. S. 232, 251, 252.

That opinion concluded:

> I agree with the result that the plaintiff is entitled to recover the taxes paid in respect of gifts made before the statute went into effect.

The careful language used in answering the question so as to restrict the answer to "gifts made during January, 1924," coupled with the reference to the Congressional history of the legislation showing that the gift tax provisions of the Act were not presented for the consideration of Congress prior to February 25, 1924, plainly suggests that gifts made subsequent to February 25th may be, in a different category from gifts made prior thereto; and that to tax gifts made subsequent thereto may not be " so arbitrary and capricious " as to violate the Fifth Amendment. All the Justices agreed that the particular gifts involved in *Blodgett* v. *Holden* were not taxable, four holding that to tax them would be unconstitutional, and four basing their opinion upon a construction of the statute. We feel that this uncertainty justifies us in presenting for the consideration of the Court the present case, because the gift involved was made long after February 25, 1924, on May 23, 1924, when the bill containing gift tax provisions had already passed both Houses of Congress, and after the conferrees appointed by the two Houses had adopted the report containing its provisions.

II

TO TAX THE GIFT HERE INVOLVED IS NOT TO MAKE THE LAW SO ARBITRARY AS TO BE UNCONSTITUTIONAL

The gift in question was made on May 23, 1924. (R. 16.) The legislative history of the gift tax provisions follows:

On February 25, 1924, in the Committee of the Whole House, Chairman Green, of the Committee on Ways and Means, proposed an amendment to the revenue bill which embodied the principle of the gift tax now under consideration. At that time he said (65 Cong. Rec., pt. 3, pp. 3119, 3120):

> Mr. Chairman, a gift tax is a corollary to an estate tax. It is perfectly idle to attempt to raise the estate tax, as we have done to-day, and make no provision with reference to gifts. The estate tax at the present time is being largely evaded by the splitting up of the large estates. I, myself, know of one large estate which has been divided into four parts by the owner thereof giving to his wife one part and one part to each of his three children. The gifts were made outright. They are absolute in form. They can not be attacked by the Treasury. But at the same time the man who made them has never lost control over the property. He now has as much control over the property as he ever had.
>
> This amendment also is needed on account of the income tax. The splitting up of large estates, of course, reduces the amount of surtaxes to be laid upon the party who so divides them. We have lost more, in my judgment, by the division of these large estates in our income taxes than we have lost by reason of tax-exempt securities, and we have lost millions upon millions by reason of tax-exempt securities.

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On the following day he proposed a modification of the terms of his amendment. (65 Cong. Rec., pt. 4, p. 3170.) On that day he said (p. 3172):

> Ever since I was connected with revenue matters, ever since I have been on the Ways and Means Committee, I have been endeavoring to get a gift tax inserted in the law. I proposed it at the first session when I was a member of that committee some 10 years ago. Ever since that time I have been laboring to get it inserted in the law, because I knew just exactly what would happen, namely, that these big estates would be gradually split up into different parts, thereby defeating both the income tax and the inheritance tax, and that is the reason our revenues are so rapidly decreasing from the big estates.

The bill containing a gift-tax provision was passed by the House on February 29, 1924. (65 Cong. Rec., p. 3354.)

On May 8, 1924, when the bill was before the Senate sitting as in Committee of the Whole, the Finance Committee proposed to strike out the gift-tax provisions of the House bill, but Senator Walsh, of Massachusetts, proposed substitute sections imposing gift taxes, and his amendment was accepted by the Senate. (65 Cong. Rec., pt. 8, pp. 8094–8097.) At that time Senator Walsh said (pp. 8095, 8096):

> There are provisions under the present law to tax gifts in anticipation of death. A

gift made within a two-year period prior to death is presumed to be a gift in anticipation of death and is included within the property that passes under the estate or inheritance tax. But there is no provision of law imposing a tax upon gifts between the living; and the greatest evasion of all evasions of the income tax has been the making of gifts by the head of a family to his wife and children, either directly or through trusts, for the purpose of having his income so reduced that he would fall within the lower brackets.

* * * * *

Again and again an effort has been made to impose some form of gift tax. In the last tax bill the Senate imposed a gift tax. It was stricken out in conference. At this session the House has imposed a gift tax and the Senate committee has recommended its removal. If the Senate now goes on record in favor of some form of gift tax, it will be enacted. It will be a question merely of rates, because the House has already committed itself.

Personally, I think we are acting when it is too late. I think the bird has flown. I think that so many and so extensive gifts have been made in the last seven years that it is almost impossible to collect anything under a gift tax. But that does not justify leaving the door wide open for a man to continue to make gifts which will permit him to escape the fair and just income and in-

heritance taxes imposed upon him under the law.

The purpose of gifts inter vivos is to lower the income tax by splitting up the volume of the taxable property.

Senator Simmons, the ranking minority member of the Finance Committee, added (p. 8096):

Mr. President, I do not as a general proposition feel disposed to give my assent to the principle involved in gift taxes. In ordinary conditions I would say that it is not a wise way of raising revenue for the Government. But conditions which confront us are abnormal and seem to me to make the imposition of a tax of this sort absolutely essential.

There are two kinds of taxes which we find it necessary to levy in the conditions which now obtain. One is the income tax, the other is the inheritance tax. From both of those taxes the Government realizes a very large amount of revenue, revenue that it can not dispense with, that is absolutely necessary to enable us to finance the Government. One of the favorite methods of evading the income tax is through the splitting up of large incomes among members of the family, thus evading the higher rates imposed by surtaxes. That has been very generally resorted to especially by men of large incomes and the Government has lost an immense amount of revenue through that means of evasion.

> The inheritance tax also has been extensively evaded in the same way. We have had no provision in the law up to this time that has afforded anything like adequate protection to the Government against those two methods of evasion. We have no statistics. Probably no statistics are available under any conditions, but we have none which would indicate exactly the amount of revenue that has been lost by this method of evading the income tax and this method of evading the estate tax as now imposed. But they have been sufficiently large and extensive, as is now generally conceded, to very greatly impair the revenues of the Government. It is a leak that ought to be stopped, and there is absolutely no way to stop it except by the imposition of a gift tax.

The bill containing a gift-tax provision was passed by the Senate May 10, 1924. (65 Cong. Rec., p. 8268.)

The bill went to conference, and, as reported by the Conference Committee, contained some amendments not material. (65 Cong. Rec., Part 9, pp. 9530, 9536, 9537.) The Conference Report, containing the gift tax provisions, was submitted in the Senate on May 22, 1924 (65 Cong. Rec., p. 9243), and in the House on May 24, 1924 (65 Cong. Rec., p. 9463). It was agreed to by the Senate on May 24, 1924 (65 Cong. Rec., p. 9421), and by the House on May 26, 1924 (65 Cong. Rec., pp. 9547,

9548). The bill was sent to the President on the same day and was approved by him on June 2, 1924.

The gift involved in this case was made the day after the Conference Report was submitted in the Senate and the day before it was agreed to by the Senate. Unless the Court is to hold that to tax any gift made before the Act was approved by the President is so arbitrary and capricious as to be a violation of the Fifth Amendment, it would seem that the gift here involved must be excepted from such condemnation. The provision had been under discussion in Congress for three months, had been passed by both Houses, had been sent to conference, and the conference had reported the bill containing the provisions. It was not until then that Mr. Untermyer made the gift. It is not an unfair inference that he had knowledge of these facts and that it was his intention to avoid the tax, if possible, before the bill should become law by the approval of the President. This is not said with intent to charge him with doing anything wrong. He had an undoubted right to seek to avoid payment of the tax by making the gift before the Act took effect. The only question is, was it arbitrary and capricious and confiscatory to tax a gift thus made?

It would not be so regarded in England.

In Halsbury's Laws of England, Vol. 27, p. 182, Sec. 352, it is stated—"There is no reason why a fiscal statute should not be retrospective if the language so directs," and in a footnote, *Hume* v. *Haig*

(1799), 8 Bro. Parl. Cas. 196, is cited as authority, and the footnote continues:

> The annual Revenue Acts, which frequently have not received the Royal Assent before the end of the session, have been made to operate so far as relates to the imposition of both existing and new duties from the date of the Resolution of the House of Commons. But in such cases, until the Act had been passed, there was, formerly, no legal obligation to pay the tax or authority to collect it (*Bowles* v. *Bank of England,* [1913] 1 Ch. 57); see now, however, Provisional Collection of Taxes Act, 1913 (3 Geo. 5, c. 3).

The statute referred to (3 Geo. 5, c. 3), provides that where a resolution is passed by the Committee on Ways and Means of the House of Commons (so long as it is a Committee on the Whole House) providing for the variation of any existing tax or for the renewal for a further period of any tax in force or imposed during the previous financial year, whether at the same or a different rate, and whether with or without modifications, and the Resolution contains a declaration that it is expedient in the public interest that the Resolution should have statutory effect under the provisions of the Act, the Resolution shall, for the period limited by the section and subject to the other provisions of the Act, have statutory effect as if contained in an Act of Parliament.

In the same work, Vol. 24, p. 537, in footnote (h) to Section 1046, it is stated:

> As a necessary precaution against evasion, the collection of many of the taxes and duties imposed by the annual Finance Acts commences as soon as the necessary resolutions have been passed by the House of Commons.

We know of no decision which has gone so far as to hold that it is so arbitrary as to offend the Constitution to tax a transaction which, like this, was not completed until the bill had passed both Houses and the differences had been adjusted by the conferees.

This case is not like that of *Nichols* v. *Coolidge*, 274 U. S. 531, decided May 31, 1927. There the Act of Congress reached back and dealt with a transfer which took place a dozen years before the law was passed and attributed to the property its value long after the transfer, and this Court said of such a law that it was "arbitrary, capricious and amounts to confiscation." Indeed, that is the only ground upon which an excise tax, uniform throughout the United States may be declared unconstitutional, assuming, of course, that the law has been enacted in the manner prescribed by the Constitution. This transfer was made after the taxpayer had been warned that Congress proposed to tax it and the warning had become a practical certainty. Under such circumstances, it is submitted, the tax can not be considered arbitrary and

unreasonable. Tax laws which were fully as retroactive as that which is involved in the present case have been sustained by this Court repeatedly. We submit that those decisions are controlling.

III

THE TAX LAW IS NOT NECESSARILY UNCONSTITUTIONAL BECAUSE RETROACTIVE

The only substantial question arising out of the retroactive features of the Act is whether they are so arbitrary and unreasonable as to violate the due process provision of the Fifth Amendment.

It is clearly established that retroactive legislation is not unconstitutional as such. The Constitution forbids Congress to enact ex post facto laws and it forbids the States to enact ex post facto laws and laws impairing the obligation of contracts, but with these express exceptions neither Federal nor State legislation is unconstitutional because it is retroactive. See, *e. g., Calder* v. *Bull,* 3 Dall. 386, 391; *The Peggy,* 1 Cranch, 103, 110; *Prize Cases,* 2 Black, 635, 670, 671; *Johannessen* v. *United States,* 225 U. S. 227, 242; *Satterlee* v. *Matthewson,* 2 Pet. 380, 413; *Curtis* v. *Whitney,* 13 Wall. 68, 70; *Kentucky Union Co.* v. *Kentucky,* 219 U. S. 140, 152, 153.

This Court has sustained State tax laws which were retroactive in scope. (*Carpenter* v. *Pennsylvania,* 17 How. 456, 463; *Orr* v. *Gilman,* 183 U. S. 278; and see *Locke* v. *New Orleans,* 4 Wall. 172,

173; *Seattle* v. *Kelleher,* 195 U. S. 351, 359, 360; *State* v. *Bell,* 61 N. C. 76, 83, 86.)

It has sustained similar Federal taxes. Thus, in *Stockdale* v. *Insurance Companies,* 20 Wall. 323, it sustained the Act of July 14, 1870, c. 255, 16 Stat. 256, 261, by which an earlier statute which might be supposed to have expired was revived and continued in existence for two years longer. The Court said (pp. 331, 332):

> The right of Congress to have imposed this tax by a new statute, although the measure of it was governed by the income of the past year, can not be doubted; much less can it be doubted that it could impose such a tax on the income of the current year, though part of that year had elapsed when the statute was passed. The joint resolution of July 4th, 1864, imposed a tax of five per cent upon all income of the previous year, although one tax on it had already been paid, and no one doubted the validity of the tax or attempted to resist it.
>
> * * * * *
>
> But where it can exercise a power by passing a new statute, which may be retroactive in its effect, the form of words which it uses to put this power in operation can not be material, if the purpose is clear, and that purpose is within the power. Congress could have passed a law to reimpose this tax retrospectively, to revive the sections under consideration if they had expired, to reenact the law by a simple reference to the sections. Has it done anything more?

This decision was followed in *Railroad Co.* v. *Rose,* 95 U. S. 78, 80.

In *Billings* v. *United States,* 232 U. S. 261, the Court sustained the Act of August 5, 1909, c. 6, 36 Stat. 11, 112, which levied a tax to be collected annually on September first on the use of foreign-built pleasure boats owned or chartered by citizens of the United States, saying (p. 282):

> Again let it be conceded that the causing the tax for the annual period to become due in September, 1909, is to give it in some respects a retroactive effect, such concession does not cause the act to be beyond the power of Congress under the Constitution to adopt.

And in *Brushaber* v. *Union Pacific R. Co.,* 240 U. S. 1, it sustained the sections of the Act of October 3, 1913, c. 16, 38 Stat. 114, 166, which provided a general income tax from December to December of each year but exceptionally fixed a first period embracing the time from March 1 to December 31, 1913. This limited retroactivity was assailed as repugnant to the due process clause of the Fifth Amendment. The Court (p. 20) declared that this contention was not entitled to further consideration, citing *Stockdale* v. *Insurance Companies, supra.*

So also, without discussing the validity of retroactive taxation, the Court in *Railroad Co.* v. *Collector,* 100 U. S. 595, 597, sustained that portion of the Act of July 13, 1866, c. 184, 14 Stat. 98, 138, 139, which imposed upon corporations a tax meas-

ured by the interest paid on their bonds, the case involving interest on bonds issued long before the law was enacted; in *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, it sustained the provisions of the Act of August 5, 1909, c. 6, 36 Stat. 11, 112, 114, which based a tax upon the net income from the then current calendar year; and in *Hecht* v. *Malley*, 265 U. S. 144, 164, it enforced a retroactive feature of the revenue law which was enacted February 24, 1919 (c. 18, 40 Stat. 1057, 1126), and which levied taxes for the entire year ending June 30, 1919. The income and excess profits provisions of that Act applied to the entire calendar year 1918.

The authorities which have been cited fully establish the broad general rule that Congress may constitutionally impose retroactive taxes. And the circumstances attending the enactment of the tax provision which is involved in the present case show no justification for this challenge of its validity.

IV

A TAX UPON TRANSFERS OF PROPERTY BY GIFT IS NOT A DIRECT TAX BUT AN EXCISE

Congress may not lay an export tax or tax the instrumentalities of the State governments. Otherwise its power of taxation is unlimited, provided only that duties, imports, and excises shall be uniform (Constitution, Art. I, Sec. 8), and direct taxes, except income taxes under the Sixteenth Amend-

ment, shall be apportioned (Constitution, Art. I, Sec. 1). The taxing power of Congress "is exhaustive and embraces every conceivable power of taxation." *Brushaber* v. *Union Pacific R. Co.*, 240 U. S. 1, 12. The gift tax, not being a tax upon exports, and being uniform, is beyond constitutional objection unless it is a direct tax.

Direct taxes are, besides capitation taxes, taxes which are levied on persons solely because of their general ownership of property and taxes which are the legal equivalent of such property taxes. This Court went thus far in the Income Tax Cases, but refused to give any broader meaning to the term. Every other tax is indirect regardless of the question whether it may be shifted from the person on whom it is first cast by law, and regardless of the question whether it may be avoided. Apparently the only legal equivalent of a tax on the general ownership of property is a tax on the income from such property.

In *Knowlton* v. *Moore*, 178 U. S. 41, which arose under the provisions of the War Revenue Act of 1898, c. 448, 30 Stat. 448, imposing a tax upon legacies, the Court pointed out that its decision in the Income Tax Cases did not furnish any basis for a rule broader than that set forth above, saying (p. 82):

> It is true that in the income tax cases the theory of certain economists by which direct and indirect taxes are classified with reference to the ability to shift the same was ad-

verted to. But this disputable theory was not the basis of the conclusion of the court. The constitutional meaning of the word direct was the matter decided. Considering that the constitutional rule of apportionment had its origin in the purpose to prevent taxes on persons solely because of their general ownership of property from being levied by any other rule than that of apportionment, two things were decided by the court: First, that no sound distinction existed between a tax levied on a person solely because of his general ownership of real property, and the same tax imposed solely because of his general ownership of personal property. Secondly, that the tax on the income derived from such property, real or personal, was the legal equivalent of a direct tax on the property from which said income was derived, and hence must be apportioned. These conclusions, however, lend no support to the contention that it was decided that duties, imposts and excises which are not the essential equivalent of a tax on property generally, real or personal, solely because of its ownership, must be converted into direct taxes, because it is conceived that it would be demonstrated by a close analysis that they could not be shifted from the person upon whom they first fall.

And in *New York Trust Co.* v. *Eisner,* 256 U. S. 345, 349, involving the estate tax under the Act of September 8, 1916, c. 463, Sec. 201, 39 Stat. 756, 777, it was held that there was no force in the con-

tention that as a tax upon the transfer of the net assets of a decedent's estate could not be avoided the tax was therefore a direct one.

As indicated by the quotation from the opinion in *Knowlton* v. *Moore, supra,* direct taxes are only those which are essentially equivalent to taxes on property generally, real or personal, solely because of its ownership. The same terms were used in *Flint* v. *Stone Tracy Co.,* 220 U. S. 107, 150, in deciding that a tax upon the privilege of doing business in a corporate capacity was not a direct tax. The Court based this conclusion upon the ground that the tax was not "upon property solely because of its ownership."

So in *Dawson* v. *Kentucky Distilleries & Warehouse Company,* 255 U. S. 288, 294, this Court said:

> The tax might be said to be upon the act of removal from the bonded warehouse within the State. But as stated by the lower court, "the thing really taxed is the act of the owner in taking his property out of storage into his own possession (absolute or qualified) for the purpose of making some one of the only uses of which it is capable, i. e., consumption, sale or keeping for future consumption or sale. * * * The whole value of the whiskey depends upon the owner's right to get it from the place where the law has compelled him to put it, and to tax the right is to tax the value." To levy a tax by reason of ownership of property is to tax the property.

A tax upon the transfer of property by gift is not equivalent to a tax upon property because of its ownership. It does not interfere with "the only uses of what it is capable." There are many useful things which one may do with his property besides giving it away. And he may give it away for religious, charitable, or public purposes without tax.

It is, rather, on the same basis as a tax on the transfer of an estate at death or one on the transfer of property by sale, or similar taxes. All such taxes have been sustained as excises.

Thus in *Scholey* v. *Rew,* 23 Wall. 331, it was held that a tax upon the succession to real estate upon the death of another was not a tax upon land but a duty or excise. This decision was not questioned in *Pollock* v. *Farmers' Loan & Trust Co.,* 157 U. S. 429, 577. It was followed in *Knowlton* v. *Moore,* 178 U. S. 41, where a tax upon the receiving of legacies was sustained as an indirect tax. In *Snyder* v. *Bettman,* 190 U. S. 249, a succession tax was enforced in the case of a transmission of property by legacy to a municipality, upon the ground that the tax was not upon the property but upon the right to succeed to the property (p. 254). And in *New York Trust Co.* v. *Eisner,* 256 U. S. 345, the case of *Knowlton* v. *Moore* was cited as disposing of the contention that a tax upon the transfer of the net estate of every decedent, to be paid by the executor, was a direct tax, the Court saying that

such a tax has always been regarded as the antithesis of a direct one (p. 349):

> It is argued that when the tax is on the privilege of receiving, the tax is indirect because it may be avoided, whereas here the tax is inevitable and therefore direct. But that matter also is disposed of by *Knowlton* v. *Moore,* not by an attempt to make some scientific distinction, which would be at least difficult, but on an interpretation of language by its traditional use—on the practical and historical ground that this kind of tax always has been regarded as the antithesis of a direct tax; "has ever been treated as a duty or excise, because of the particular occasion which gives rise to its levy." 178 U. S. 81–83. Upon this point a page of history is worth a volume of logic.

The debates in Congress, heretofore referred to, show that the gift tax was intended to be supplemental to the estate tax and the income tax, and to prevent evasion of those taxes. And it is significant that the exemptions from tax of gifts for religious and charitable purposes are similar to the exemptions under the Estate Tax provisions (Section 303). A tax upon a transfer by gift is analogous to a tax upon a transfer at death or by sale. All such taxes are sustained as excises.

Thus taxes upon particular types of sales. *Nicol* v. *Ames,* 173 U. S. 509; *Thomas* v. *United States,* 192 U. S. 363; see also *Pacific Insurance Company* v. *Soule,* 7 Wall. 433, 446.

Particular commodities—*Hylton* v. *United States,* 3 Dall. 171; *Veazie Bank* v. *Fenno,* 8 Wall. 533; *Patton* v. *Brady,* 184 U. S. 608; *McCray* v. *United States,* 195 U. S. 27; see also *Billings* v. *United States,* 232 U. S. 261; *Bowman* v. *Continental Oil Co.,* 256 U. S. 642, 649.

Particular methods of doing business—*Spreckels Sugar Refining Company* v. *McClain,* 192 U. S. 397; *Flint* v. *Stone Tracy Co.,* 220 U. S. 107; *Stratton's Independence* v. *Howbert,* 231 U. S. 399, 414; see also *Doyle* v. *Mitchell Bros. Co.,* 247 U. S. 179, 183.

If a tax upon a designated type of transfer of property, or upon the transfer of a designated type of property, must be sustained as an indirect tax, it necessarily follows that a tax upon the gratuitous transfer of property *inter vivos,* that is a particularly designated type of transfer, must be so classed.

The Revenue Act of February 24, 1919, c. 18, 40 Stat. 1057, imposed a great number of excise taxes upon many different things and transactions, among them being a tax upon the amount paid for transportation, including accommodations in sleeping cars, telegraph and telephone messages (Section 500, pp. 1101, 1102); upon insurance policies (Section 503, p. 1104); upon beverages (Section 600, p. 1105), including a floor tax upon distilled spirits (Section 604, p. 1107); upon cigars and tobacco (Section 700, p. 1116); upon admissions to places of amusement (Section 800, p. 1120); upon

membership dues in clubs (Section 801, p. 1121), and upon sales of all sorts of articles, including automobiles, pianos, tennis rackets, skates, baseball bats, chewing gum, electric fans, and soap (Section 900, p. 1122); carpets, picture frames, umbrellas, and various kinds of wearing apparel (Section 904, p. 1123). It also imposed taxes in the form of stamps upon bonds, capital stock issues, and capital stock transfers and deeds (Section 1100, p. 1135). It is difficult to see how a tax upon the sale of property differs in principle from a tax upon a gift of property.

Brown v. *Maryland,* 12 Wheat. 419, and similar cases have no bearing upon the question at issue. They have been distinguished by this Court repeatedly, as in *Nicol* v. *Ames,* 173 U. S. 509, 518; *Thomas* v. *United States,* 192 U. S. 363, 371; *Flint* v. *Stone Tracy Co.,* 220 U. S. 107, 162–167; *New York Trust Co.* v. *Eisner,* 256 U. S. 345, 348. It is true that where a State may not constitutionally tax a transaction in any manner whatever, an indirect method of reaching a prohibited result is unconstitutional. But as Congress has the right to lay both direct and indirect taxes if it lays them on the permitted bases (*Brushaber* v. *Union Pacific R. Co.,* 240 U. S. 1, 13)—to tax property if it follows the rule of apportionment and dealings in property if it follows the rule of uniformity—there would be far less reason for considering whether a Federal excise tax were a subterfuge for the reaching of a prohibited end even though the

tax which purported to be indirect should have in its effects some points of resemblance to a conceivable direct tax. Moreover, there is nothing exceptional in the levying of excises. They have long been recognized as appropriate and normal methods of raising revenues. Indeed, taxation by uniform laws and not by apportionment among the States constitutes the only fair method of raising the revenues necessary for the running of the Government. To say that a tax must be collected by apportionment as a direct tax is, practically, to say that it is not a possible source of revenue. Under these circumstances there certainly can not be any presumption that a tax closely analogous to taxes which have been repeatedly sustained as indirect taxes is in its essence a direct tax. On the contrary, there must be a strong presumption of its validity.

As this Court said in *Nicol* v. *Ames,* 173 U. S. 509, 515:

> It is only when the question is free from any reasonable doubt that the court should hold an act of the lawmaking power of the nation to be in violation of that fundamental instrument upon which all the powers of the Government rest. This is particularly true of a revenue act of Congress. * * * The power to tax is the one great power upon which the whole national fabric is based. It is as necessary to the existence and prosperity of a nation as is the air he breathes

to the natural man. It is not only the power to destroy, but it is also the power to keep alive.

The time has long since passed, of course, when the right to impose an excise tax is sustained upon the theory that the transaction taxed was the exercise of a privilege conferred by the sovereign authority.

Billings v. *United States,* 232 U. S. 261; *Hylton* v. *United States,* 3 Dall. 171; *Thomas* v. *United States,* 192 U. S. 363.

V

The judgment of the Circuit Court of Appeals should be affirmed.

WILLIAM D. MITCHELL,
Solicitor General.
ALFRED A. WHEAT,
Special Assistant to the Attorney General.
ROBERT P. REEDER,
Special Assistant to the Attorney General.

JANUARY, 1928.

APPENDIX

(Act of June 2, 1924, c. 234, 43 Stat. 253; U. S. C., Title 26, Secs. 1131–1136)

SEC. 319. For the calendar year 1924 and each calendar year thereafter, a tax equal to the sum of the following is hereby imposed upon the transfer by a resident by gift during such calendar year of any property wherever situated, whether made directly or indirectly, and upon the transfer by a nonresident by gift during such calendar year of any property situated within the United States, whether made directly or indirectly:

[Here follow the rates of tax.]

SEC. 320. If the gift is made in property, the fair market value thereof at the date of the gift shall be considered the amount of the gift. Where property is sold or exchanged for less than a fair consideration in money or money's worth, then the amount by which the fair market value of the property exceeded the consideration received shall, for the purpose of the tax imposed by section 319, be deemed a gift, and shall be included in computing the amount of gifts made during the calendar year.

SEC. 321. In computing the amount of the gifts subject to the tax imposed by section 319, there shall be allowed as deductions:

(a) In the case of a resident—

(1) An exemption of $50,000;

(2) The amount of all gifts or contributions made within the calendar year to or for the use of

the United States, any State, Territory, any political subdivision thereof, or the District of Columbia, for exclusively public purposes, or to or for the use of any corporation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, including the encouragement of art and the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private stockholder or individual, or to a trustee or trustees, or fraternal society, order, or association, operating under the lodge system, but only if such gifts or contributions are to be used by such trustee or trustees or by such fraternal society, order, or association, exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, and the amount of all gifts or contributions made within the calendar year by such corporation, trustee, or fraternal society, order, or association for a religious, charitable, scientific, literary, or educational purpose, or for the prevention of cruelty to children or animals, and the amount of all gifts or contributions made within the calendar year to the special fund for vocational rehabilitation authorized by section 7 of the Vocational Rehabilitation Act;

(3) Gifts the aggregate amount of which to any one person does not exceed $500;

(4) An amount equal to the value of any property transferred by gift within the calendar year, which can be identified (A) as having been received by the donor within five years prior to the time of his making such gift, either from another person

by gift or from a decedent by gift, bequest, devise, or inheritance, or (B) as having been acquired in exchange for property so received. This deduction shall be allowed only where a gift tax or an estate tax under this or any prior act of Congress was paid by or on behalf of the donor or the estate of such decedent, as the case may be, and only in the amount of the value placed by the Commissioner on such property in determining the value of the gift or the gross estate of such decedent, and only to the extent that the value of such property is included in the total amount of gifts made within the calendar year and not deducted under paragraph (2) or (3) of this subdivision.

* * * * *

SEC. 322. In case a tax has been imposed under section 319 upon any gift, and thereafter upon the death of the donor the amount thereof is required by any provision of Part I of this title to be included in the gross estate of the decedent then there shall be credited against and applied in reduction of the estate tax, which would otherwise be chargeable against the estate of the decedent under the provisions of section 301, an amount equal to the tax paid with respect to such gift; and in the event the donor has in any year paid the tax imposed by section 319 with respect to a gift or gifts which upon the death of the donor must be included in his gross estate and a gift or gifts not required to be so included, then the amount of the tax which shall be deemed to have been paid with respect to the gift or gifts required to be so included shall be that proportion of the entire tax paid on account of all such gifts which the amount of the gift or gifts required

to be so included bears to the total amount of gifts in that year.

SEC. 323. Any person who within the year 1924 or any calendar year thereafter makes any gift or gifts in excess of the deductions allowed by section 321 shall, on or before the 15th day of March, file with the collector a return under oath in duplicate, listing and setting forth therein all gifts and contributions made by him during such calendar year (other than the gifts specified in paragraph (3) of subdivision (a) and in paragraph (2) of subdivision (b) of section 321), and the fair market value thereof when made, and also all sales and exchanges of property owned by him made within such year for less than a fair consideration in money or money's worth, stating therein the fair market value of the property so sold or exchanged and that of the consideration received by him, both as of the date of such sale or exchange.

SEC. 324. The tax imposed by section 319 shall be paid by the donor on or before the 15th day of March, and shall be assessed, collected, and paid in the same manner and subject, in so far as applicable, to the same provisions of law as the tax imposed by section 301.

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See Holden - Blodgett, 48 SC. 105

SUPREME COURT OF THE UNITED STATES.

No. 221.—October Term, 1927.

Fannie E. Untermyer, as Executrix, and Edward D. Untermyer, as Executor, under the last will and testament of Isaac Untermyer, Deceased, Petitioners,

vs.

Charles W. Anderson, as Collector of Internal Revenue of the United States of America for the Third District of New York.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

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[April 9, 1928.]

Mr Justice McReynolds delivered the opinion of the Court.

By the original action commenced in the United States District Court, Southern District of New York, Isaac Untermyer sought to recover of the U. S. Collector of Internal Revenue the tax exacted of him, under the Act of June 2, 1924,—Secs. 319, *et seq.*,—on account of a gift which he made May 23, 1924. After his death the cause was revived in the name of the executors—petitioners herein—and was then heard upon an agreed statement of facts. Both sides moved for a directed verdict. Judgment went for the Collector and was affirmed by the Circuit Court of Appeals.

The questions now presented for consideration are similar to those involved in *Blodgett* v. *Holden*, decided here November 21, 1927.

The two causes differ in this: Blodgett's gifts were made during January, 1924, before the provisions for taxing such transfers were presented for the consideration of Congress; Untermyer made his gift May 23, 1924, some three months after those provisions were first presented and while the conference report upon the bill was pending. This report went to the Senate May 22, 1924, and three days thereafter the bill had finally passed both houses. The President approved it on June 2, 1924.

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Unless the difference in circumstances stated is material, the same rule of law must govern both cases.

Two opinions were announced in *Blodgett* v. *Holden.* The one prepared by the present writer, expressed the views of four of the eight Justices who participated in the consideration of the cause. After quoting the pertinent provisions of the statute, etc., the opinion declared: "So far as the Revenue Act of 1924 undertakes to impose a tax because of the gifts made during January, 1924, it is arbitrary and invalid under the due process clause of the Fifth Amendment." We need not now further repeat what was there set out.

In the light of arguments advanced by counsel in the present cause the matter has been considered by all members of the Court and a majority of them are of opinion that the gift tax provisions of the Act of 1924 here challenged must be construed as applicable to gifts made during the entire calendar year 1924. And, further, that so far as applicable to bona fide gifts not made in anticipation of death and fully consummated prior to June 2, 1924, those provisions are arbitrary and invalid under the due process clause of the Fifth Amendment.

The mere fact that a gift was made while the bill containing the questioned provisions was in the last stage of progress through Congress we think is not enough to differentiate this cause from the former one and to relieve the legislation of the arbitrary character there ascribed to it. To accept the contrary view would produce insuperable difficulties touching interpretation and practical application of the Statute and render impossible proper understanding of the burden intended to be imposed. The taxpayer may justly demand to know when and how he becomes liable for taxes—he cannot foresee and ought not to be required to guess the outcome of pending measures. The future of every bill while before Congress is necessarily uncertain. The will of the lawmakers is not definitely expressed until final action thereon has been taken.

The judgment below must be reversed.

Mr. Justice SANFORD concurs in the result.

A true copy.

Test:

Clerk, Supreme Court, U. S.

SUPREME COURT OF THE UNITED STATES.

No. 221.—October Term, 1927.

Fannie E. Untermyer, as Executrix, et al., Petitioners, *vs.* Anderson, Collector of Internal Revenue. | On certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[April 9, 1928.]

Mr. Justice Holmes.

As I think the construction of the Act of June 2, 1924, c. 234, § 319, adopted by four of us in *Blodgett* v. *Holden*, November 21, 1927, the proper one, I shall not go into the question of constitutionality beyond saying that I find it hard to state to myself articulately the ground for denying the power of Congress to lay the tax. We all know that we shall get a tax bill every year. I suppose that the taxing act may be passed in the middle as lawfully as at the beginning of the year. A tax may be levied for past privileges and protection as well as for those to come. *Wagner* v. *Baltimore*, 239 U. S. 207, 216. *Billings* v. *United States*, 232 U. S. 261, 282. *Seattle* v. *Kelleher*, 195 U. S. 351. *Stockdale* v. *Atlantic Insurance Co.*, 20 Wall. 323. I do not imagine that the authority of Congress to tax the exercise of the legal power to make a gift will be doubted any more than its authority to tax a sale. Apart from its bearing upon construction and constitutionality I am not at liberty to consider the justice of the Act.

Mr. Justice Brandeis and Mr. Justice Stone agree with this opinion.

Mr. Justice Brandeis, with whom Mr. Justice Holmes and Mr. Justice Stone concur.

To what Mr. Justice Holmes has said, I add this. The Court construes the Act as applying to all gifts made during the calendar

year. Then it holds the Act void as applied to a gift made during the ten-day period between the submission of the Conference Report to Congress and the approval of the Act by the President. It holds the Act void because the action of the law-making body is, in its opinion, unreasonable. Tested by the standard of reasonableness commonly adopted by man—use and wont—that action appears to be reasonable. Tested by a still higher standard to which all Americans must bow—long continued practice of Congress repeatedly sanctioned by this Court after full argument—its validity would have seemed unquestionable, but for views recently expressed. No other standard has been suggested.

For more than half a century, it has been settled that a law of Congress imposing a tax may be retroactive in its operation. *Stockdale* v. *Insurance Companies,* 20 Wall. 323, 331; *Railroad Co.* v. *Rose,* 95 U. S. 78, 80; *Railroad Co.* v. *United States,* 101 U. S. 543, 549; *Flint* v. *Stone Tracy Co.,* 220 U. S. 107; *Billings* v. *United States,* 232 U. S. 261, 282; *Brushaber* v. *Union Pacific R. R. Co.,* 240 U. S. 1, 20; *Lynch* v. *Hornby,* 247 U. S. 339, 343; *Hecht* v. *Malley,* 265 U. S. 144, 164. Each of the fifteen income tax acts adopted from time to time during the last sixty-seven years has been retroactive, in that it applied to income earned, prior to the passage of the act, during the calendar year.[1] The Act of October

[1]The Act of August 5, 1861, c. 45, 12 Stat. 292, 309, applied to all incomes for the calendar year next preceding January 1, 1862. The Act of July 1, 1862, c. 119, 12 Stat. 432, 473, enacted higher rates, applicable to incomes for the year ending December 31, 1862. The Joint Resolution of July 4, 1864, No. 77, 13 Stat. 417, imposed an additional tax of 5% on incomes for 1863 which had already been taxed at the rates established by the Act of 1862. The Act of June 30, 1864, c. 173, 13 Stat. 223, 281, applied to incomes for the then current calendar year. The Act of March 3, 1865, c. 78, 13 Stat. 469, 479, which again raised the rates, applied to income for the year ending December 31, 1865. The Act of March 2, 1867, c. 169, 14 Stat. 471, 477, also applied to income for the current calendar year. The Act of July 14, 1870, c. 255, 16 Stat. 256, 257, taxed incomes for the year commencing January 1, 1870, though the Acts of June 30, 1864, c. 173, 13 Stat. 223, 283, of July 13, 1866, c. 184, 14 Stat. 98, 138, and of March 2, 1867, c. 169, 14 Stat. 471, 480, had provided that income arising after January 1, 1870, was to be free from tax. The Act of August 27, 1894, c. 349, 28 Stat. 509, 553, applied to incomes in the calendar year ending December 31, 1894. The Act of October 3, 1913, c. 16, 38 Stat. 114, 166, applied to incomes received subsequent to March 1, 1913. The Act of September 8, 1916, c. 463, 39 Stat. 756, applied to all income of that year. The increased rates established by the Act of October 3, 1917, c. 63, 40 Stat. 300, applied to incomes received during the

3, 1913, c. 16, 38 Stat. 114, 166, which taxed all incomes received after March 1, 1913, was specifically upheld in *Brushaber* v. *Union Pacific R. R. Co.*, 240 U. S. 1, 20, and in *Lynch* v. *Hornby*, 247 U. S. 339, 343. Some of the acts have taxed income earned in an earlier year. The Joint Resolution of July 4, 1864, No. 77, 13 Stat. 417, imposed an additional tax on incomes earned during the calendar year 1863, this additional tax being imposed after the taxes for the year had been paid. In *Stockdale* v. *Insurance Companies*, 20 Wall. 323, 331, Mr. Justice Miller said: "No one doubted the validity of the tax or attempted to resist it." The Act of February 24, 1919, c. 18, Title II, 40 Stat. 1057, 1058-1088, which taxed incomes for the calendar year 1918, was applied, without question as to its constitutionality, in *United States* v. *Robbins*, 269 U. S. 315, and numerous other cases.

The Corporation Tax Act of August 5, 1909, c. 6, § 38, 36 Stat. 11, 112, applying to all net income for the calendar year, was sustained in *Flint* v. *Stone Tracy Co.*, 220 U. S. 107. The Acts of March 3, 1917, c. 159, 39 Stat. 1000, and of October 3, 1917, c. 63, 40 Stat. 300, 302, imposing excess profits taxes on the profits earned during the calendar year, were so applied in *LaBelle Iron Works* v. *United States*, 256 U. S. 377, in *Greenport Basin & Construction Co.* v. *United States*, 260 U. S. 512, and in other cases. The validity of the Act of February 24, 1919, c. 18, Title III, 40 Stat. 1057, 1088, taxing excess profits earned during the calendar year 1918, has never been questioned. Compare *Willcuts* v. *Milton Dairy Co.*, 275 U. S. —; *Blair* v. *Oesterlein Machinery Co.*, 275 U. S. —; *Porto Rico Coal Co.* v. *Edwards*, 275 Fed. 104; *National Paper & Type Co.* v. *Edwards*, 292 Fed. 633. The Munition Manufacturer's Tax, imposed by the Act of September 8, 1916, c. 463, Title III, 39 Stat. 756, 780, applied to the twelve months ending December 31, 1916. Compare *Carbon Steel Co.* v. *Lewellyn*, 251 U. S. 501; *United States* v. *Anderson*, 269 U. S. 422, 435. The Act of February 24, 1919, c. 18, 40 Stat. 1057, 1126, which materially increased the capital stock tax, made the increase retroactive to July 1, 1918. In *Hecht* v. *Malley*, 265 U. S. 144, 164, these retro-

calendar year commencing January 1, 1917. The Revenue Act of 1918, February 24, 1919, c. 18, 40 Stat. 1057, 1058, applied to incomes for the year 1918. Later Revenue Acts have been similarly retroactive with respect to the income tax: Act of November 23, 1921, c. 136, 42 Stat. 227; Act of June 2, 1924, c. 234, 43 Stat. 253, 254; Act of February 26, 1926, c. 27, 44 Stat. 9, 10.

active provisions were held to validate taxes erroneously assessed under an earlier act and paid before the passage of the Act of 1919.

Except for the peculiar tax involved in *Nichols* v. *Coolidge*, 274 U. S. 531, no federal revenue measure has ever been held invalid on the score of retroactivity. The need of the Government for revenue has hitherto been deemed a sufficient justification for making a tax measure retroactive whenever the imposition seemed consonant with justice and the conditions were not such as would ordinarily involve hardship. On this broad ground rest the cases in which a special assessment upon real estate has been upheld although the benefit resulting from the improvement had been enjoyed and the cost thereof had been paid prior to any legislation attempting to authorize the assessment, *Wagner* v. *Baltimore*, 239 U. S. 207; also the cases in which special assessments upon real estate have been upheld although the benefit had been conferred and the cost thereof had been paid before there was a valid authorization either of the improvement or of the assessment. Compare *Charlotte Harbor & Northern Ry. Co.* v. *Welles*, 260 U. S. 8. Such retroactive legislation has been sustained, although the validating statute was not enacted until after the property benefitted had passed to a bona fide purchaser without notice of any claim that it had been, or might be, assessed for a benefit. *Seattle* v. *Kelleher*, 195 U. S. 351. Compare *Citizens National Bank* v. *Kentucky*, 217 U. S. 443, 454. The right of the Philippine Government to retain import and export duties laid and collected without authority, was sustained where thereafter Congress by retroactive legislation confirmed the unlawful action in collecting the duties. *United States* v. *Heinszen & Co.*, 206 U. S. 370; *Rafferty* v. *Smith, Bell & Co.*, 257 U. S. 226. Liability for taxes under retroactive legislation has been "one of the notorious incidents of social life." *Seattle* v. *Kelleher*, 195 U. S. 351, 360. Recently this Court recognized broadly that "a tax may be imposed in respect of past benefits." *Forbes Boat Line* v. *Board of Commissioners*, 258 U. S. 338, 339.

The Act with which we are here concerned had, however, a special justification for retroactive features. The gift tax was imposed largely to prevent evasion of the estate tax by gifts inter vivos, and evasion of the income tax by the splitting up of fortunes and the consequent diminution of surtaxes. If, as is thought by the Court, Congress intended the gift tax to apply to all gifts during the calen-

dar year, its purpose may well have been to prevent evasion of the gift tax itself, by the making of gifts after its introduction and prior to its passage. Is Congress powerless to prevent such evasion by the vigilant and ingenious? This Court has often recognized that a measure may be valid as a necessary adjunct to a matter that lies within legislative power, even though, standing alone, its constitutionality might have been subject to doubt. *Purity Extract Co.* v. *Lynch,* 226 U. S. 192; *Ruppert* v. *Caffey,* 251 U. S. 264, 289; *Everard's Breweries* v. *Day,* 265 U. S. 545, 560. If the legislature may prohibit the sale of confessedly innocent articles in order to insure the effective prohibition of others, I see no reason why it may not spread a tax over a period in advance of its enactment sufficiently long to insure that the tax will not be evaded by anticipating the passage of the act. Compare *United States* v. *Doremus,* 249 U. S. 86, 94. In taxation, as well as in other matters, "the law allows a penumbra to be embraced that goes beyond the outline of its object in order that the object may be secured." See Mr. Justice Holmes in *Schlesinger* v. *Wisconsin,* 270 U. S. 230, 241. Under the rule now applied, even a measure framed to prevent evasion of a tax from a date when it is practically certain that the act will become law, is deemed unreasonable and arbitrary.

The problem of preventing loss of revenue by transactions intervening between the date when legislation is introduced and its final enactment, is not a new one; nor is it one peculiar to the gift tax. Other nations have met it by a method similar to that which the Court holds to be denied to Congress. England long ago adopted the practice of making customs and excise duties retroactive to the beginning of the fiscal year or to the date when the government's resolutions were agreed to by the House of Commons sitting as a Committee of Ways and Means.[2] A similar prac-

[2]The practice applies not only to tariff and excise measures, but to all kinds of impositions. For examples of the practice, compare: (a) as to tariffs and excises, Acts of May 25, 1855, 18 & 19 Vict., cc. 21, 22, retroactive to dates in April, 1855; Act of July 31, 1894, 57 & 58 Vict., c. 30, §§ 26-29, retroactive to April 17, 1894; Act of April 29, 1910, 10 Edw. 7, c. 8, §§ 81, 82, 84, retroactive to April 30, 1909; Act of December 23, 1915, 5 & 6 Geo. 5, c. 89, §§ 1-12, retroactive to dates in September, 1915; Act of July 29, 1927, 17 & 18 Geo. 5, c. 10, retroactive to April 12, 1927; (b) as to income tax, Act of June 22, 1842, 5 & 6 Vict., c. 35, retroactive to April 5, 1842; Acts of May 12 and June 16, 1854, 17 & 18 Vict., cc. 10, 24, retroactive to April 6, 1854;

tice prevails in Ireland,[3] in all the self-governing Dominions,[4] and to some extent in France and Italy.[5] In the United States, retroactive operation of the tariff has been repeatedly recommended by the Tariff Commission and by the Secretary of Commerce.[6] Legislation to that end was reported by the Committee on Ways and

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Act of May 25, 1855, 18 & 19 Vict., c. 20, retroactive to April 5, 1855; Act of July 31, 1894, 57 & 58 Vict., c. 30, § 33, retroactive to April 6, 1894; Act of April 29, 1910, 10 Edw. 7, c. 8, §§ 65-66, retroactive to April 6, 1909; Act of July 29, 1915, 5 & 6 Geo. 5, c. 62, § 10, retroactive to April 6, 1915; Act of December 23, 1915, 5 & 6 Geo. 5, c. 89, § 20, raising by 40% the rates for the last six months of the current income tax year; (c) as to inheritance tax, Act of April 29, 1910, 10 Edw. 7, c. 8, § 54, retroactive to April 30, 1909. The proposed taxes are provisionally collected from the date of the resolution of the House of Commons. As to customs and excises this is said to have rested on ancient usage. Highmore, The Customs Laws, 3d ed., 61; May, Parliamentary Practice, 11th ed., 589. In Bowles *v.* Bank of England, [1913] 1 Ch. 57, it was held that until the passage of the Finance Act a tax-payer was under no legal obligation to pay the sum provisionally assessed as income tax by the Treasury. By the Provisional Collection of Taxes Act, 3 Geo. 5, c. 3, a resolution of the Committee on Ways and Means of the House of Commons relative to the imposition of any tax and declaring it to be in the public interest that the resolution should have statutory effect, is given the same force as an act of Parliament, provisional on the final enactment of the tax.

[3]See, *e. g.*, Act of May 21, 1927, retroactive to April 22, 1927.

[4]See (a) as to Canada, Act of July 19, 1924, retroactive to April 11, 1924; (b) as to Newfoundland, Act of June 9, 1926, retroactive to May 19, 1926; (c) as to Australia, amendment to the tariff effective provisionally on November 25, 1927, and not yet finally approved; (d) as to New Zealand, Act of October 25, 1927, giving the force of law to all resolutions purporting to impose customs duties passed by the House of Representatives on or after September 13, 1927; (e) as to the Union of South Africa, motion of the Minister of Finance, April 5, 1926, "that, subject to an Act to be passed during the present session of Parliament, and to such rebates or remissions of duty as may be provided for therein, the customs duties on the articles as set forth in the accompanying Schedule be increased to the extent shown therein." This motion was embodied in Act No. 34, published in the Union Gazette Extraordinary of June 9, 1926.

[5]See Journal Office, December 31, 1926, p. 13,749; Interim Legislation, a Report by the Tariff Commission, pp. 34-36.

[6]See Interim Legislation, a Report submitted by the Tariff Commission to the Chairman of the Committee on Ways and Means of the House of Representatives, April 16, 1917. The recommendation has been repeated in the Annual Reports of the Commission: First Annual Report, 1917, p. 5; Third Annual Report, 1919, p. 7; Fourth Annual Report, 1920, p. 6; Sixth Annual Report, 1922, p. 8. The Secretary of Commerce made a similar recommendation in a letter of May 10, 1921, to the Chairman of the Ways and Means Committee. House Report, 67th Cong., 1st Sess., No. 86, p. 5.

Means of the House of Representatives.[7] No suggestion seems to have been made that such legislation would by its retroactive feature violate the due process clause.[8]

For nearly a century after the adoption of the Constitution, this Court approached with great reluctance the exercise of its high prerogative of declaring invalid an act of Congress. In *Ogden* v. *Saunders,* 12 Wheat. 213, 270, it said with respect to a state statute: "It is but a decent respect due to the wisdom, the integrity, and the patriotism of the legislative body, by which any law is passed, to presume in favour of its validity, until its violation of the constitution is proved beyond all reasonable doubt." In the *Sinking Fund Cases,* 99 U. S. 700, 718, this Court said with respect to an act of Congress: "Every possible presumption is in favor of the validity of a statute, and this continues until the contrary is shown beyond a rational doubt. One branch of the government cannot encroach on the domain of another without danger. The safety of our institutions depends in no small degree on a strict observance of this salutary rule." The presumption in favor of the validity of an act of Congress, often adverted to, has been acted upon as recently as *United States* v. *Berwind-White Coal Mining Co.,* 274 U. S. 564; and *Hampton, Jr., & Co.* v. *United States,* No. 242, this day decided. The presumption should be particularly strong where, as here, the objection to an act arises not from a specific limitation or prohibition on Congressional power but only out of the "vague contours of the Fifth Amendment, prohibiting the depriving any person of liberty or property without due process of law", Mr. Justice Holmes in *Adkins* v. *Children's Hospital,* 260 U. S. 525, 568. I find no reason for thinking that the presumption has been overcome.

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[7]H. J. Res., 67th Cong., 1st Sess., No. 124, 61 Cong. Rec. 1590, 1592, 1618; House Report, 67th Cong., 1st Sess., No. 86.

[8]On May 31, 1921, a member of the Ways and Means Committee filed a minority statement in which he objected to the proposed legislation on the ground that it amounted to a delegation of legislative power to a committee of the House of Representatives. 61 Cong. Rec. 1927.